

## EXHIBIT 3

REDACTED  
PENDING MOTION TO SEAL

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MASSACHUSETTS

3 -----x  
4 BIO-RAD LABORATORIES, INC. and PRESIDENT  
5 AND FELLOWS OF HARVARD COLLEGE, **REPORTER CERTIFIED**  
6 Plaintiffs, **TRANSCRIPT**

7 vs. Civil Action No.

8 10X GENOMICS, INC., 1:19-cv-12533-WGY  
9 Defendant.

10 \*\*\*CAPTION CONTINUED\*\*\*

**CONFIDENTIAL**

11 -----x  
12 VIDEOTAPED STENOGRAPHIC DEPOSITION OF:  
13 JAMES E. MALACKOWSKI  
14 Tuesday, April 6, 2021  
15 11:02 a.m. - 7:09 p.m.  
Reported Remotely through Videoconference  
\*\*CONFIDENTIAL\*\*  
\*\*OUTSIDE ATTORNEYS' EYES ONLY INFORMATION\*\*

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22 Reported stenographically by:  
23 Richard Germosen, CA CSR No. 14391  
RDR, CRR, CCR, CRCR, NYACR, NYRCR  
NCRA/NJ/NY/CA Certified Realtime Reporter  
NCRA Realtime Systems Administrator  
Job No. 40704



1 -----x  
2 \*\*\*CAPTION CONTINUED\*\*\*  
3

4 10X GENOMICS, INC.,  
5 Counterclaim Plaintiff,  
6 -and-  
7 PRESIDENT AND FELLOWS OF HARVARD COLLEGE,  
8 Counterclaim Co-Plaintiff  
9 as to certain claims,  
10 vs.  
11 BIO-RAD LABORATORIES, INC.,  
12 Counterclaim Defendant,  
13 -and-  
14 PRESIDENT AND FELLOWS OF HARVARD COLLEGE,  
15 Counterclaim Co-Defendant as to  
16 DJ counterclaims.  
17 -----x  
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1 VIDEOTAPED TELECONFERENCED STENOGRAPHIC  
2 DEPOSITION of JAMES E. MALACKOWSKI, taken in the  
3 above-entitled matter before RICHARD GERMOSEN, Certified  
4 Court Reporter, (License No. 30XI00184700), Certified  
5 Realtime Court Reporter-NJ, (License No. 30XR00016800),  
6 California Certified Shorthand Reporter, (License No.  
7 14391), NCRA/NY/CA Certified Realtime Reporter, NCRA  
8 Registered Diplomate Reporter, New York Association  
9 Certified Reporter, NCRA Realtime Systems Administrator,  
10 taken remotely on Tuesday, April 6, 2021, commencing at  
11 11:02 a.m.

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## 1 A P P E A R A N C E S :

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1 A P P E A R A N C E S: (CONT'D.)

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## I N D E X

2

WITNESS

EXAMINATION

3

JAMES E. MALACKOWSKI

4

BY MS. HADZIMEHMEDOVIC

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## E X H I B I T S

7

EXHIBIT NO. DESCRIPTION PAGE

8

9 Exhibit 1 document entitled Expert 12  
10 Report of James E.  
11 Malackowski, February 5, 2021

12

13 Exhibit 2 document entitled 81  
14 Georgia-Pacific Corp. v.  
15 United States Plywood Corp.

16

17 Exhibit 3 document entitled Videotaped 101  
18 Deposition of James E.  
19 Malackowski, October 26, 2017

20

21 Exhibit 4 amendment number two to the 133  
22 realtime PCR instrument  
23 license

24

25

## 1                   E X H I B I T S (CONT'D.)

2 EXHIBIT NO.	3 DESCRIPTION	4 PAGE
5 Exhibit 5	6 trial transcript from the 152 7 trial	8 147
9 Exhibit 6	10 document entitled Videotaped Deposition of John A. Luckey, Ph.D., Friday, September 11, 2020  (exhibit index concluded)	11 209

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P R O C E E D I N G S

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11:02 a.m.

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4

1:02:13 5 THE VIDEOGRAPHER: Stand by, please.

1:02:42 6 Good morning. We are going on the

1:02:49 7 record. The time on the screen is 11:02 a.m.

1:02:54 8 Eastern Standard Time. Today's date is April 6,

1:02:59 9 We are located remotely via Zoom video

1:03:06 10 conferencing with all parties appearing remotely.

1:03:09 11 This marks the beginning of media

1:03:11 12 unit number one of the deposition of James

1:03:14 13 Malackowski, testifying in the matter of Bio-Rad

1:03:19 14 Laboratories, Inc., versus 10X Genomics, et al., and

1:03:24 15 related cross-actions venued in the United States

1:03:29 16 District Court for the District of Massachusetts,

1:03:34 17 case number is 1:19-cv-12533-WGY.

1:03:45 18 My name is David Manzo. I'm a legal

1:03:48 19 video specialist here on behalf of Chase Litigation

1:03:49 20 Services. The court reporter is Rich Germosen, also

1:03:55 21 here on behalf of Chase Litigation Services.

1:04:00 22 Counsel, would you please identify

1:04:01 23 yourself and state whom you represent.

1:04:05 24 MS. HADZIMEHMEDOVIC: Azra

1:04:05 25 Hadzimehmmedovic. With me are Gina Cremona and

1:04:10 1 Ashley Nelson from Tensegrity Law Group here on  
1:04:15 2 behalf of 10X Genomics, Inc.

1:04:19 3 MS. TU: This is Xiaoxi Tu from Weil  
1:04:21 4 Gotshal & Manges on behalf of Bio-Rad.

1:04:28 5 THE VIDEOGRAPHER: Will the court  
1:04:28 6 reporter please swear in the witness.

1:04:34 7 CERTIFIED STENOGRAPHER: Good  
1:04:34 8 morning. My name is Rich Germosen. I am a  
1:04:34 9 certified stenographic reporter. My license is  
1:04:34 10 available for inspection.

1:04:34 11 Can I please have a stipulation from  
1:04:34 12 all counsel present that you will not object to the  
1:04:34 13 validity of this remote swearing now or in the  
1:04:34 14 future?

1:04:56 15 MS. HADZIMEHMEDOVIC: Yes.

1:04:57 16 MS. TU: Yes.

1:04:57 17 (Whereupon, the Certified Realtime  
1:04:57 18 Stenographer administered the oath to the witness.)

1:04:57 19 J A M E S E. M A L A C K O W S K I,  
1:04:57 20 having been first duly sworn or affirmed, was  
1:04:57 21 examined and testified as follows:

1:04:57 22 EXAMINATION BY MS. HADZIMEHMEDOVIC:  
1:04:57 23 BY MS. HADZIMEHMEDOVIC:

1:05:12 24 Q. Good morning, Mr. Malackowski.

1:05:14 1 A. Good morning.  
1:05:16 2 Q. Please state your name.  
1:05:18 3 A. James Edward Malackowski.  
1:05:21 4 Q. What is the address from which you  
1:05:23 5 are appearing today?

1:05:25 [REDACTED]

1:05:30 [REDACTED]

1:05:35 8 Q. You have been deposed many times  
1:05:36 9 before; correct?

1:05:38 10 A. Yes, ma'am.

1:05:40 11 Q. Since the 10X Bio-Rad trial in  
1:05:43 12 Delaware 152 case, have you testified at trial?

1:05:53 13 A. Actually, would have to give that  
1:05:55 14 some thought. Nothing immediately comes to mind  
1:05:57 15 largely because of the pandemic, but I suppose there  
1:06:01 16 will be at least one or two matters because I have  
1:06:04 17 given at least one video -- trial by video and at  
1:06:09 18 least one trial in person during the pandemic. So  
1:06:13 19 the ones that I recall were by video, Centripetal  
1:06:19 20 versus Cisco, and in-person, Security Point versus  
1:06:29 21 the TSA.

1:06:33 22 I don't recall others though. They  
1:06:34 23 would all be listed on my CV.

1:06:38 24 Q. Did you appear as an expert for  
1:06:40 25 plaintiffs in those two cases?

1:06:45 1 A. Yes.

1:06:49 2 Q. You've had a chance to prepare with

1:06:50 3 counsel before your deposition today; correct?

1:06:54 4 A. Yes, ma'am.

1:06:56 5 Q. Was anyone else present aside from

1:06:59 6 counsel during your deposition presentation?

1:07:01 7 A. Yes, ma'am. Two of my colleagues

1:07:02 8 from Ocean Tomo, a Mr. Hess and Mr. Clemons.

1:07:06 9 Q. Anyone else?

1:07:07 10 A. No, ma'am.

1:07:11 11 Q. Is there any reason why you couldn't

1:07:12 12 give your best and most truthful testimony today?

1:07:19 13 A. I don't believe so, no, ma'am.

1:07:20 14 Q. Is it correct that you were retained

1:07:22 15 by counsel for Bio-Rad in this case to offer

1:07:25 16 opinions on damages?

1:07:30 17 A. Specifically Ocean Tomo was retained

1:07:32 18 by counsel for plaintiffs to offer opinions largely

1:07:35 19 related and focused on damages, yes.

1:07:40 20 Q. Are you retained by counsel for

1:07:42 21 Bio-Rad only or by counsel for Bio-Rad and Harvard?

1:07:58 22 A. As described on page five of my

1:08:00 23 report, Ocean Tomo was retained by counsel for

1:08:04 24 Bio-Rad Laboratories and the President and Fellows

1:08:05 25 of Harvard College collectively.

1:08:12 1 Q. Do you recall when you were first  
1:08:13 2 retained by counsel for plaintiffs to offer opinions  
1:08:19 3 in this particular case, the Massachusetts 10X  
1:08:23 4 Bio-Rad matter?

1:08:25 5 A. I believe it was the summer of last  
1:08:27 6 year, approximately June.

1:08:39 7 Q. You have prepared an expert report  
1:08:40 8 containing your opinions and the bases for those  
1:08:43 9 opinions relating to the amount of damages 10X would  
1:08:47 10 owe should Bio-Rad prove that 10X infringes  
1:08:47 11 Bio-Rad's asserted patent; correct?

1:08:51 12 A. More specifically, I prepared two  
1:08:53 13 expert reports, an initial report that was produced  
1:08:58 14 in February, on the 5th of February of this year,  
1:09:01 15 and a recent supplemental report that was produced I  
1:09:06 16 believe last week.

1:09:13 17 MS. HADZIMEHMEDOVIC: Ashley, if we  
1:09:14 18 could please mark exhibit one and show it on the  
1:09:30 19 screen for the witness.

1:09:35 20 (Whereupon, document entitled Expert  
1:09:35 21 Report of James E. Malackowski, February 5, 2021, is  
1:09:35 22 received and marked as Exhibit 1 for  
1:09:35 23 Identification.)

1:09:36 24 BY MS. HADZIMEHMEDOVIC:

1:09:37 25 Q. Mr. Malackowski, we have exhibit one,

1:44:21 1 matters which involve trade secrets. In trade  
1:44:25 2 secret cases, the burden for the plaintiffs in  
1:44:29 3 assessing damages is relatively light. Essentially  
1:44:33 4 they need only prove the revenues of the defendant,  
1:44:35 5 and the burden of the defendant is quite high. They  
1:44:38 6 have to show any deduction from revenues for  
1:44:42 7 profitability, as well as any apportionment from  
1:44:46 8 those profits to the trade secrets at issue, and  
1:44:51 9 those matters can become very, very detailed and  
1:44:55 10 involved and time-consuming, and I've worked, it  
1:44:58 11 seems, like on a number of them in the past three  
1:45:02 12 years.

1:45:15 13 Q. Is it your experience that you  
1:45:18 14 roughly spend the same amount of hours if the  
1:45:23 15 matters are roughly the same, whether you're a  
1:45:29 16 defense or a plaintiff's expert in a patent case?

1:45:34 17 A. The number of hours in a patent case  
1:45:37 18 is really not impacted by whether you're  
1:45:40 19 representing the plaintiff or the defendant. The  
1:45:42 20 number of hours in any given case is impacted more  
1:45:45 21 directly by the number of patents that are at issue  
1:45:48 22 in the case, the financial amount at risk, the  
1:45:55 23 extent of discovery.

1:46:03 24 Q. In the reasonable royalty analysis in  
1:46:05 25 this case, one of the approaches that you have used

1:46:09 1 is the so-called market approach; correct?

1:46:13 2 A. I've considered the market approach  
1:46:15 3 as a quantitative indicator for the Georgia-Pacific  
1:46:20 4 analysis, that's true.

1:46:22 5 Q. Would you please turn to page 71 of  
1:46:23 6 your report?

1:46:36 7 A. Yes, I have it.

1:46:37 8 Q. And if you would turn to the first  
1:46:39 9 bullet. Is it fair to say that this first bullet on  
1:46:49 10 page 71 of exhibit one includes a summary of the  
1:46:54 11 result of your market approach analysis?

1:46:58 12 A. At a high level, I think that is  
1:46:59 13 fair.

1:47:04 14 Q. It lists in the three separate  
1:47:06 15 bullets the licenses you considered in the market  
1:47:11 16 approach; correct?

1:47:13 17 A. Yes, ma'am.

1:47:15 18 Q. The first bullet lists  
1:47:16 19 Caliper/RainDance, then Applied Biosystem/QuantaLife  
1:47:22 20 license, and the Applera/Bio-Rad license; correct?

1:47:27 21 A. Yes, and just to clarify, this is  
1:47:29 22 more appropriately described as a list of the  
1:47:31 23 licenses that I relied upon or focused on. There  
1:47:34 24 are other licenses that I have considered that are  
1:47:36 25 not contained within these bullets because they were

1:47:39 1 deemed to be not comparable or relevant.

1:47:45 2 Q. The second bullet lists the  
1:47:48 3 MRC/RainDance license and the Harvard/RainDance  
1:47:51 4 license that you relied upon; correct?

1:47:56 5 A. Yes, ma'am.

1:47:56 6 Q. And the third and last bullet lists  
1:47:58 7 the [REDACTED] license that you relied upon in your  
1:48:01 8 market approach; correct?

1:48:04 9 A. Yes, ma'am.

1:48:07 10 Q. The stated rates for the licenses you  
1:48:11 11 relied upon in the market approach are as low as  
1:48:14 12 1 percent; correct?

1:48:18 13 A. I believe that's true, though we  
1:48:19 14 would have to refer back to each agreement because  
1:48:20 15 they do vary.

1:48:24 16 Q. And the highest stated royalty rate  
1:48:26 17 in those agreements was 15 percent; correct?

1:48:31 18 A. Yes, I believe that is true.

1:48:37 19 Q. Based on your interpretation of the  
1:48:39 20 licenses that you relied upon for the market  
1:48:41 21 approach, you determined that the range is 4 percent  
1:48:48 22 to 15 percent; correct?

1:48:52 23 A. Yes. Let me go back though and  
1:48:55 24 correct my last answer. I believe one of the  
1:48:57 25 agreements through an amendment has a stated rate of

1:50:48 1 page 34 of my report and it's actually  
1:50:50 2 15.75 percent.

1:50:57 3 Q. You're speaking about the amendment  
1:51:02 4 to the Applera/Bio-Rad license; correct?

1:51:08 5 A. Yes, ma'am.

1:51:11 6 Q. You did not rely upon that rate in  
1:51:19 7 your opinions in this case; is that fair?

1:51:21 8 A. Yes, ma'am.

1:51:28 9 Q. The market approach was an input that  
1:51:32 10 you used and then you apply the Georgia-Pacific  
1:51:37 11 factors as a qualitative assessment with the  
1:51:40 12 starting point from the market approach?

1:51:48 13 A. If that's a question, I would answer  
1:51:49 14 yes, that's what I did.

1:51:54 15 Q. You concluded that 10X and Bio-Rad  
1:51:57 16 would agree to the high end of your market approach  
1:52:01 17 determined rates; correct?

1:52:04 18 A. Well, more specifically as described  
1:52:05 19 within my report, I concluded they would agree to a  
1:52:09 20 rate above the high end of the market approach, but  
1:52:12 21 to be conservative, I have capped the royalty at the  
1:52:16 22 15 percent rate.

1:52:48 23 Q. You did also opine that as a result,  
1:52:50 24 the hypothetical negotiation would result in a  
1:52:52 25 reasonable royalty rate toward the high end of the

1:54:31 1 that was suitable for the facts of this case. Then  
1:54:35 2 I applied the Georgia-Pacific criteria.

1:54:41 3 Q. The Georgia-Pacific factors provided  
1:54:43 4 a qualitative adjustment to the market approach  
1:54:48 5 conclusions; correct?

1:54:50 6 A. Generally speaking, yes.

1:54:52 7 Q. And it's fair to say that there is  
1:54:53 8 really no explicit way to calculate the increment  
1:55:00 9 provided through your Georgia-Pacific analysis to  
1:55:04 10 the rate that you determined?

1:55:08 11 A. Well, there is no formula for  
1:55:10 12 Georgia-Pacific, if that's what you're asking, as in  
1:55:14 13 start with X and add 10 percent for one factor,  
1:55:17 14 subtract 5 percent for another. That calculus does  
1:55:22 15 not exist. In this case, because I'm conservatively  
1:55:27 16 capping the royalty within the range founded by  
1:55:31 17 market approach, the question really doesn't have  
1:55:34 18 necessity because there is no change from that  
1:55:36 19 initial starting point in order to be conservative.

1:55:50 20 (Stenographer clarification.)

1:55:53 21 MS. TU: Yeah. Jim, if you could  
1:55:54 22 just wait a couple of seconds or just one second  
1:55:57 23 would be great.

1:56:05 24 Yes, I did object to that question.

1:56:16 25 Q. You concluded that Bio-Rad and 10X

1:56:20 1 would agree in the hypothetical negotiation to the  
1:56:23 2 highest stated rate in any of the agreements that  
1:56:27 3 you have relied upon in this case; correct?

1:56:34 4 MS. TU: Objection.

1:56:37 5 A. I have concluded they would agree to  
1:56:40 6 a 15 percent rate, which is at the upper end of the  
1:56:45 7 range that I relied upon, though lower than the  
1:56:48 8 highest stated rate within the agreements considered  
1:56:52 9 as we discussed.

1:57:03 10 Q. The question was about agreement  
1:57:05 11 relied upon, so I'll repeat it.

1:57:07 12 You have concluded that Bio-Rad and  
1:57:09 13 10X would agree in the hypothetical negotiation to  
1:57:13 14 the highest stated rate in any of the agreements  
1:57:18 15 that you have relied upon in this case; correct?

1:57:22 16 MS. TU: Objection.

1:57:25 17 A. So I'm not sure how that question is  
1:57:27 18 different, and I don't want to give the impression  
1:57:29 19 that the conclusion of the negotiation was the  
1:57:32 20 highest possible rate. They weren't -- there wasn't  
1:57:36 21 a conclusion saying, Let's first agree to what would  
1:57:39 22 be highest, then let's figure out what that is.

1:57:41 23 The conclusion was a 15 percent rate  
1:57:44 24 conservatively determined, but consistent with the  
1:57:49 25 upper bound of the range of the agreements I relied

1:57:53 1 upon.

1:58:00 2 Q. The rate that you concluded, the  
1:58:02 3 15 percent rate that you opined Bio-Rad and 10X  
1:58:06 4 would agree to in the hypothetical negotiation is,  
1:58:10 5 indeed, the highest stated rate in any of the  
1:58:14 6 agreements that you have relied upon in this case;  
1:58:16 7 correct?

1:58:19 8 MS. TU: Objection.

1:58:21 9 A. Arithmetically speaking, it is equal  
1:58:23 10 to the upper bound, that's true.

1:58:29 11 Q. You agree that the textbooks approach  
1:58:32 12 on the market analysis teaches that -- strike that.

1:58:38 13 You would agree that the textbook  
1:58:41 14 approach on the market analysis approach teaches  
1:58:43 15 that any market approach analysis would likely  
1:58:48 16 require reasonable adjustments?

1:58:54 17 MS. TU: Objection.

1:58:56 18 A. I am not averse to that sentence. I  
1:59:00 19 don't know if you're reading from my report or a  
1:59:01 20 textbook, but in most cases there would be  
1:59:05 21 reasonable adjustment, and, indeed, in this case, I  
1:59:11 22 believe one could apply a reasonable adjustment to  
1:59:16 23 reach a conclusion that exceeds the bounds of the  
1:59:20 24 existing agreements, meaning a royalty determination  
1:59:23 25 in excess of 15 percent. I have not done that.

1:59:30 1 Q. One of your adjustments was to adjust  
1:59:32 2 the rates of Harvard/RainDance and MRC/RainDance  
1:59:36 3 licenses; correct?

1:59:43 4 A. Within my report, I do show  
1:59:44 5 adjustments to those rates to facilitate  
1:59:48 6 comparability to the other agreements. That is  
1:59:49 7 true.

1:59:50 8 Q. You adjust the rates of those two  
1:59:52 9 licenses, Harvard/RainDance and MRC/RainDance,  
1:59:54 10 upward by doubling them; correct?

1:59:59 11 MS. TU: Objection.

2:00:01 12 A. I adjust them upward arithmetically  
2:00:04 13 using a doubling factor based on the LES research  
2:00:08 14 that I cite in my report and my general experience  
2:00:13 15 on such an adjustment.

2:00:15 16 Q. And your opinion is that even after  
2:00:19 17 doubling the stated rates of the Harvard/RainDance  
2:00:22 18 and the MRC/RainDance license, those rates doubled  
2:00:27 19 are still just the floor on your analysis; correct?

2:00:31 20 MS. TU: Objection.

2:00:37 21 A. Well, my report will describe them  
2:00:39 22 specifically, but I believe that those rates, even  
2:00:40 23 after adjustment, are not as economically comparable  
2:00:44 24 to the other agreements that I rely upon, and so if  
2:00:46 25 they were to be used or considered at all, they

2:00:49 1 would have to be considered as the floor.

2:00:52 2 Q. These two licenses, Harvard/RainDance  
2:00:55 3 and the MRC/RainDance license, you would agree with  
2:00:59 4 me are the most technologically comparable licenses  
2:01:03 5 in the record; correct?

2:01:04 6 MS. TU: Objection.

2:01:07 7 A. I think that's really a better  
2:01:08 8 question for Dr. Gale. I do recognize that these  
2:01:12 9 agreements include the prior patent filings that  
2:01:18 10 ultimately matured to the two patents-in-suit. So  
2:01:23 11 that makes them technically comparable generally  
2:01:26 12 speaking and I recognize that. I don't draw an  
2:01:30 13 opinion as to whether, therefore, that makes them  
2:01:32 14 more technically comparable.

2:01:35 15 I would limit such a qualitative  
2:01:39 16 ranking of agreements to ones that only included the  
2:01:43 17 patents-in-suit.

2:01:49 18 Q. Mr. Malackowski, if you could please  
2:01:50 19 turn to page 48 of exhibit one. Your February 5  
2:01:56 20 report.

2:02:02 21 A. Yes, ma'am.

2:02:03 22 Q. Section 12.1.7.

2:02:07 23 A. Yes, ma'am.

2:02:08 24 Q. And look at the very last sentence  
2:02:13 25 starting -- paragraph starting with "however," which

2:02:16 1 is a single sentence.

2:02:18 2 A. Yes, ma'am.

2:02:19 3 Q. If you could read that and let me  
2:02:20 4 know when you're done.

2:02:22 5 A. I have. I would simply note the  
2:02:29 6 ending phrase of, quote, in the record. Whereas,  
2:02:31 7 your questions were speaking in the absolute sense.  
2:02:35 8 So I certainly stand by my prior answer, as well as  
2:02:37 9 the language within this report.

2:02:40 10 Q. Well, we could reread my question,  
2:02:43 11 but I'll ask it again.

2:02:49 12 Those two licenses, Harvard/RainDance  
2:02:52 13 and MRC/RainDance, are the two licenses that are the  
2:02:58 14 most technically comparable licenses in the record;  
2:03:01 15 correct?

2:03:04 16 A. Well, not on their face. Again, the  
2:03:07 17 paragraph that you cite caveats that by saying  
2:03:09 18 "along with certain quantitative adjustments." So  
2:03:14 19 with quantitative adjustments, limiting it to what's  
2:03:19 20 in the record, then they would be the most  
2:03:21 21 technically comparable. In an absolute sense, just  
2:03:24 22 from a licensing theory standpoint, the most  
2:03:26 23 technically comparable agreements would be ones that  
2:03:28 24 only address the patents-in-suit.

2:03:36 25 Q. Are you standing by the clause in

2:03:37 1 this sentence that says: Therefore, the most  
2:03:41 2 technically comparable licenses in the record?

2:03:50 3 A. Yes, in the context of the entire  
2:03:51 4 sentence.

2:04:02 5 Q. The reason they are the most  
2:04:04 6 technically comparable licenses in the record is as  
2:04:05 7 you said, because they include the rights to the two  
2:04:09 8 patents-in-suit here, the '444 and '277; correct?

2:04:14 9 A. That is the reason why I draw the  
2:04:17 10 conclusion that I do in the paragraph that you cite,  
2:04:21 11 that's true, because of that lineage.

2:04:33 12 Q. Just for ease of reference, we can go  
2:04:35 13 back to page 71 of exhibit one. The stated rates in  
2:04:48 14 the Applied Biosystems/QuantaLife license are in the  
2:04:52 15 range of 10 percent to 15 percent; correct?

2:05:11 16 A. That is correct. Defer to my report  
2:05:13 17 that describes that range in detail, but I believe  
2:05:16 18 that's right.

2:05:17 19 Q. You adjust that 10 to 15 percent rate  
2:05:21 20 to 15 percent royalty rate; correct?

2:05:51 21 A. My conclusion with respect to the  
2:05:53 22 Applied Biosystems/QuantaLife license as shown on  
2:05:56 23 page 32 is, quote: Indicative of a reasonable  
2:06:01 24 royalty rate in this case of between 10 percent and  
2:06:04 25 15 percent of net sales, end quote.

2:06:07 1 So there is no specific adjustment of  
2:06:09 2 that agreement to the high end or the low end of  
2:06:13 3 that range.

2:06:24 4 Q. The Caliper/RainDance license  
2:06:26 5 included a -- sorry. Strike that.

2:06:28 6 The Caliper/RainDance license  
2:06:30 7 included a 2 percent royalty rate and a 15 percent  
2:06:35 8 royalty rate; correct?

2:06:39 9 A. Yes. Largely driven upon whether or  
2:06:42 10 not the products at issue would be considered  
2:06:45 11 competitive.

2:06:47 12 Q. 15 percent rate applied to chips and  
2:06:50 13 reagents, but not instruments?

2:06:56 14 A. That is my general recollection, yes.  
2:07:00 15 Q. When applying the royalty rate in the  
2:07:04 16 hypothetical negotiation to 10X's products, you  
2:07:08 17 include not only chips and reagents, but instruments  
2:07:11 18 as well; correct?

2:07:14 19 A. Yes, I understand that the  
2:07:17 20 instruments are also accused of infringing.

2:07:20 21 Q. But not only are they accused of  
2:07:22 22 infringing, you specifically include them in the  
2:07:24 23 royalty base; correct?

2:07:28 24 A. Yes, ma'am.

2:07:31 25 Q. RainDance never paid the 15 percent

2:09:13 1 regarding the agreement, but you are correct, that  
2:09:17 2 as far as the basis of the royalty rates that I  
2:09:22 3 extract from the agreement, it's from the 2009  
2:09:24 4 agreement itself.

2:09:29 5 Q. You were not aware, were you, that  
2:09:32 6 RainDance, in fact, considered this license to be  
2:09:36 7 one where it had a 1 percent to 2 percent royalty  
2:09:41 8 rate obligation; correct?

2:09:46 9 MS. TU: Objection.

2:09:48 10 A. I believe you're referring to  
2:09:52 11 correspondence regarding the license. Obviously, I  
2:09:55 12 do recognize that there are other payments that are  
2:10:08 13 provided in the license, such as a 2 percent royalty  
2:10:12 14 for nonscreening applications. There are other fees  
2:10:17 15 within the license that are stated milestone  
2:10:21 16 payments less than 2 percent.

2:10:34 17 Q. RainDance's internal documents  
2:10:36 18 produced in this case, aside from the 2009 agreement  
2:10:44 19 itself, do not reference the 15 percent rate; is  
2:10:49 20 that right?

2:10:52 21 MS. TU: Objection.

2:10:53 22 A. I could not speculate as to what all  
2:10:57 23 of the other documents may or may not reference. I  
2:11:03 24 would suspect that within the total population of  
2:11:07 25 trade negotiation documents are draft licenses. I

2:37:40 1 opinion regarding the royalties 10X owes on two  
2:37:43 2 patents-in-suit, the '444 and '277 patent; correct?

2:37:49 3 A. Yes, ma'am.

2:37:52 4 Q. You do not offer any opinion on  
2:37:55 5 frequency of use of the claimed inventions in the  
2:37:58 6 two asserted patents; correct?

2:38:04 7 A. Correct, not as I understand your  
2:38:05 8 question. So the royalty base is revenues, not some  
2:38:09 9 other use base metric and, therefore, there is no  
2:38:13 10 such analysis in my report.

2:38:18 11 Q. You also do not have an understanding  
2:38:24 12 of whether the claims of the '444 and '277 patent  
2:38:30 13 are or are not limited in a sense that only a subset  
2:38:34 14 of droplets generated by means of 10X's chips as  
2:38:39 15 opposed to all of the droplets generated are  
2:38:43 16 practicing the claimed inventions?

2:38:46 17 MS. TU: Objection.

2:38:50 18 A. So that is a better question for the  
2:38:52 19 technical expert, which addresses each claim element  
2:38:56 20 against the products in suit. I don't draw an  
2:38:59 21 opinion that it is necessarily every droplet that  
2:39:04 22 falls within the specific claims, but that generally  
2:39:07 23 speaking, the patents-in-suit address the intended  
2:39:12 24 purpose and functionality of the products at issue.

2:39:23 25 Q. Assuming that the benefit of the

2:39:25 1 claimed inventions in the '444 and '277 applies only  
2:39:30 2 to the subset of droplets and not all, you have not  
2:39:34 3 made an adjustment to assess that possibility;  
2:39:39 4 correct?

2:39:43 5 A. Well, I understand that is a  
2:39:44 6 possibility. I talk within my report about how in  
2:39:48 7 this industry companies use revenues to facilitate  
2:39:53 8 accounting and that is considered within the license  
2:39:58 9 agreements that I rely upon, and barring any  
2:40:02 10 evidence to suggest that it would be a substantial  
2:40:08 11 impact on the perceived benefits of negotiation, I  
2:40:12 12 have not made a further adjustment to account for  
2:40:17 13 the issue you raise.

2:40:31 14 Q. You take as the base the full price  
2:40:34 15 of 10X's instruments, 10X's chips, and 10X's gel  
2:40:39 16 bead and other reagents and apply the royalty rate  
2:40:44 17 that you have determined; correct?

2:41:05 18 (Stenographer clarification.)

2:41:07 19 Q. I'm a little bit far from the mic so  
2:41:08 20 that I can have my papers in front of me. So you  
2:41:14 21 take as the royalty base the net revenue price of  
2:41:23 22 10X's instruments, 10X's chips, and 10X's gel beads  
2:41:30 23 and other reagents and apply the royalty rate that  
2:41:34 24 you have determined to that royalty base; correct?

2:41:39 25 A. Generally, yes, as I understand those

2:41:41 1 are the accused revenues.

2:41:48 2 Q. Is it correct that you have not been  
2:41:49 3 asked to consider the damages on a patent-by-patent  
2:41:52 4 basis?

2:41:56 5 A. That is true, though because of the  
2:42:00 6 lineage of the patents-in-suit here, they generally  
2:42:05 7 relate to similar functionality, and so I don't  
2:42:08 8 believe the royalty would change if only a subset of  
2:42:13 9 the asserted claims was found to infringe.

2:42:22 10 Q. Your opinion is that neither the  
2:42:24 11 royalty base nor the royalty rate would change if  
2:42:30 12 only a subset of the asserted claims were found to  
2:42:33 13 infringe; is that correct?

2:42:39 14 A. More specifically, my opinion is the  
2:42:41 15 royalty rate would not change, but to the extent  
2:42:43 16 that there was a legal ruling that removed certain  
2:42:48 17 claims from the accusations in this case and as a  
2:42:52 18 result certain revenues were no longer considered  
2:42:55 19 infringing, then I would remove the noninfringing  
2:43:00 20 revenues from my analysis.

2:43:08 21 Q. But your opinions in this case  
2:43:09 22 presently do not provide that contingent analysis;  
2:43:13 23 correct? You have not said if this claim is out of  
2:43:19 24 the case, then my base is reduced by this amount; is  
2:43:23 25 that fair?

2:43:26 1           A.       It is fair in the sense that I'm not  
2:43:28 2 aware of any data that would allow for that specific  
2:43:32 3 base reduction. That said, in the spirit of  
2:43:35 4 disclosure, I recognize that Ms. Davis does make  
2:43:42 5 certain deductions to the royalty base for legal or  
2:43:45 6 apportionment reasons, and I do not dispute her  
2:43:50 7 deductions. So I would anticipate revising the  
2:43:54 8 royalty base in my analysis to conform with hers.

2:44:16 9           Q.       How do you anticipate revising your  
2:44:17 10 royalty base to conform with Ms. Davis' analysis?  
2:44:23 11 Are you anticipating a supplement to your report?

2:44:30 12           A.       I have not discussed with counsel  
2:44:31 13 whether a supplement would be necessary as  
2:44:34 14 essentially it's simple math utilizing the royalty  
2:44:38 15 base in the Ms. Davis report and simply multiplying  
2:44:42 16 by the 15 percent royalty that I opined to.

2:45:01 17           Q.       I'm looking at the rough transcript,  
2:45:02 18 so I just want to make sure that I understand what  
2:45:06 19 you've said. You said: I recognize that Ms. Davis  
2:45:10 20 does make certain deductions to the royalty base for  
2:45:13 21 legal and apportionment reasons and I do not dispute  
2:45:18 22 other deductions.

2:45:20 23                     Did you say that you do not dispute  
2:45:21 24 her deductions?

2:45:23 25           A.       Yes.

2:45:27 1 Q. So you are agreeing with all of the  
2:45:30 2 deductions that Ms. Davis made to the royalty base;  
2:45:37 3 is that fair?

2:45:39 4 A. More specifically, I would say I am  
2:45:41 5 accepting her deductions. Many of them are for  
2:45:45 6 legal reasons, which are outside the scope of my  
2:45:50 7 testimony, but in an effort to both remove  
2:45:55 8 unnecessary dispute and to focus on the real issue,  
2:45:59 9 which is the royalty rate, I believe Ms. Davis and I  
2:46:03 10 will present the same royalty base to the jury.

2:46:43 11 Q. You may say I've asked you the  
2:46:44 12 question, but I really haven't asked it this  
2:46:47 13 particular way, so bear with me.

2:46:51 14 Your opinion is the same whether 10X  
2:46:56 15 infringes only the '444 patent, only the '277 patent  
2:47:02 16 or both '444 and '277 patents; correct?

2:47:06 17 A. The royalty rate is the same. To the  
2:47:09 18 extent there would be legal reasons to adjust the  
2:47:11 19 base, I would certainly take that into account. I'm  
2:47:14 20 not aware of any such distinction.

2:47:29 21 Q. If one of the patents drops out, your  
2:47:32 22 opinion regarding the amount of damages does not  
2:47:37 23 change; correct?

2:47:42 24 A. To stick with my prior response,  
2:47:43 25 barring any change in asserted infringing revenue,

2:47:48 1 the total would not change.

2:47:52 2 Q. Your opinion is that the value is the  
2:47:54 3 same when Bio-Rad is seeking royalties on 14 claims  
2:48:01 4 of two patents and when Bio-Rad may be seeking  
2:48:05 5 royalties on a single asserted claim of a single  
2:48:08 6 patent; is that fair?

2:48:11 7 A. Arithmetically, it is the same  
2:48:13 8 answer, but it is because in part of industry  
2:48:18 9 experience and the examples I'm relying upon, where  
2:48:22 10 there are comparable agreements with multiple patent  
2:48:24 11 rights, where the amount that's due under the  
2:48:27 12 agreement does not bury if one or more of the  
2:48:31 13 patents in many cases were found to later be invalid  
2:48:34 14 or not utilized.

2:48:56 15 Q. You have not segregated or identified  
2:48:58 16 a particular value associated with any particular  
2:49:03 17 single asserted claim; is that right?

2:49:07 18 A. I have not specifically identified or  
2:49:10 19 make a distinguishing calculation by claim as  
2:49:14 20 distinct from the collection of asserted claims and  
2:49:17 21 the assumption that the patents are valid and  
2:49:20 22 infringed.

2:49:24 23 Q. And although when assumed valid and  
2:49:27 24 infringed, each claim is presumed to cover a  
2:49:31 25 specific invention, you have not isolated the value

2:49:35 1 of any one specific claim; correct?

2:49:39 2 A. Correct. Both for the assumption  
2:49:43 3 that I describe, as well as industry practice  
2:49:45 4 consistent with the agreements I rely upon.

2:49:48 5 Q. Would you please turn to page 15 of  
2:49:50 6 exhibit one.

2:50:05 7 A. I have it.

2:50:06 8 Q. On page 15 of your report in exhibit  
2:50:08 9 one, you list what you understood at the time to be  
2:50:13 10 claims asserted against 10X in this case, '444 and  
2:50:19 11 '277 patent; correct?

2:50:22 12 A. Yes, ma'am.

2:50:25 13 Q. And in opining in coming up with your  
2:50:33 14 conclusions in this case, you assumed that the  
2:50:38 15 claims one, two, four, eight and nine of '444 patent  
2:50:43 16 were asserted and you assume that claims one to six,  
2:50:46 17 eight, nine, 11, 13 and 14 of the '277 patent were  
2:50:50 18 asserted; correct?

2:50:53 19 A. Yes, ma'am.

2:51:00 20 Q. Now, Dr. Gale did not offer any  
2:51:08 21 opinions about 10X's infringement of claim nine of  
2:51:13 22 '444 patent or claim 13 of '277 patent. Is that  
2:51:18 23 your present understanding?

2:51:21 24 A. I don't recall from memory sitting  
2:51:23 25 here such narrowing of Dr. Gale's report. I would

2:51:32 1 have to go back and understand or confirm if that's  
2:51:36 2 the case, and then also I noted that Ms. Davis made  
2:51:39 3 certain royalty based deductions for reasons related  
2:51:43 4 to Dr. Gale's proof, and so I would also want to  
2:51:50 5 confirm if these were coincident issues, meaning  
2:51:53 6 that the claims you just identified form the basis  
2:51:56 7 for Ms. Davis' asserted deductions, which I am not  
2:52:00 8 disputing.

2:52:05 9 Q. If we could just for the purposes of  
2:52:06 10 this examination assume that Ms. Davis' deductions  
2:52:10 11 did not have anything to do with claim nine or claim  
2:52:14 12 13 not being asserted in the case anymore. So  
2:52:17 13 assume that for the moment, and assume that it is  
2:52:21 14 correct that Bio-Rad is no longer asserting claim  
2:52:24 15 nine of the '444 patent and claim '277 of the --  
2:52:30 16 sorry, claim 13 of the '277 patent. With those  
2:52:37 17 assumptions, is it still your opinion that the  
2:52:41 18 amount of damages does not change by means of  
2:52:49 19 Bio-Rad no longer asserting claims nine of the '444  
2:52:53 20 patent and claim 13 of the '277 patent?

2:53:01 21 A. Yes, under those assumptions, for the  
2:53:02 22 reasons I described, there would be no change in the  
2:53:04 23 final damages.

2:53:11 24 Q. You are aware that claim one of the  
2:53:14 25 '444 patent includes a detection step that is not

2:53:18 1 part of the claim one of the '277 patent?

2:53:25 2 A. I can see that as a distinguishing  
2:53:28 3 characteristic of the two claims, yes, ma'am.

2:53:34 4 Q. It is your opinion though that the  
2:53:36 5 value of claim one of the '444 patent is the same as  
2:53:40 6 the value of the claim one of the '277 patent  
2:53:44 7 despite the detection requirement of claim one of  
2:53:49 8 the '444 patent not being a requirement in the claim  
2:53:53 9 one of the '277 patent; correct?

2:53:57 10 A. No, I don't think that's fair because  
2:54:00 11 I don't do a comparative claim-by-claim value  
2:54:03 12 assessment. That was not my assignment. My  
2:54:07 13 assignment was to determine the royalty that would  
2:54:09 14 be appropriate if the patents are valid and if the  
2:54:14 15 products infringe. Not a claim-by-claim  
2:54:18 16 calculation.

2:54:20 17 Q. But isn't it fair to say that the  
2:54:23 18 import of your analysis is that if there is a single  
2:54:26 19 claim standing after trial, the amount of damages  
2:54:31 20 you calculate is the same; correct?

2:54:36 21 MS. TU: Objection.

2:54:37 22 A. If that single claim addresses the  
2:54:39 23 same set of products, then yes, all of those  
2:54:43 24 products would be infringing. All of those products  
2:54:48 25 would benefit from the claim.

11:12:04 1 foundational and two as improvements in the Stillal  
11:12:06 2 case; correct?

11:12:10 3 A. Generally speaking, yes.

11:12:15 4 Q. That insight comes to you from the  
11:12:17 5 technical experts in the Stillal case; correct?

11:12:25 6 A. It does, although I believe the legal  
11:12:27 7 pleadings also make reference to the same  
11:12:29 8 distinction.

11:12:35 9 Q. In the 10X case for the '444 patent,  
11:12:37 10 Bio-Rad expert, Dr. Gale, opined that the '444  
11:12:40 11 patent is an improvement over the foundational  
11:12:45 12 intellectual property in this space?

11:12:50 13 A. Correct, and I believe that is  
11:12:51 14 consistent with the treatment of the '444 patent in  
11:12:54 15 the Stillal case, which is the one patent that  
11:12:56 16 overlaps both matters.

11:13:04 17 Q. Now, Dr. Gale did opine -- strike  
11:13:07 18 that.

11:13:07 19 Your understanding is that Dr. Gale  
11:13:12 20 did opine that the '444 patent in our case is an  
11:13:18 21 improvement over the foundational intellectual  
11:13:20 22 property, but he did not identify in the 10X case  
11:13:27 23 which foundational intellectual property he was  
11:13:30 24 referring to; is that right?

11:13:33 25 A. From memory, I could not speak to

11:13:36 1 whether he provided an answer in deposition or his  
11:13:40 2 report to that question. I would defer to him.  
11:13:47 3 That distinction is not necessary for my work.

11:13:53 4 Q. Is it your opinion that it is not  
11:13:57 5 necessary for you to understand what foundational  
11:14:01 6 intellectual property the '444 and '277 may have  
11:14:07 7 improved upon?

11:14:09 8 MS. TU: Objection.

11:14:10 9 A. As it relates to my work in the 10X  
11:14:13 10 case, which we're discussing today, Dr. Gale's  
11:14:19 11 specific reference to prior foundational technology  
11:14:23 12 for the '444 or the '277 does not impact my analysis  
11:14:31 13 because of the further work that he did where he was  
11:14:35 14 able to assess the relative contribution of the  
11:14:39 15 patents-in-suit to the benchmark agreements in the  
11:14:43 16 patents that were licensed there, and that's what I  
11:14:46 17 primarily rely upon from his work.

11:15:06 18 Q. Is it fair to say that it's really  
11:15:07 19 not the increment in value that the '444 and '277  
11:15:12 20 provide over some foundational intellectual property  
11:15:17 21 that is critical to your analysis, but instead it is  
11:15:22 22 the assessment of the relative contributions of the  
11:15:25 23 patents-in-suit to 10X's products versus the  
11:15:29 24 benchmark agreements where you have licensed  
11:15:33 25 products and licensed patents?

1:17:36 1 case to know if I specifically referenced that. I  
1:17:41 2 would certainly stand by whatever I said in that  
1:17:43 3 report or that testimony.

1:18:08 4 Q. It is correct, isn't it, that you  
1:18:09 5 have not included a definition of the term  
1:18:14 6 "improvement" as it applies to the '444 and '277  
1:18:23 7 patents?

1:18:26 8 A. Correct. I don't believe I  
1:18:28 9 specifically define that term. I use that language  
1:18:31 10 in relaying what I understand the description of the  
1:18:35 11 technology to be from the technical expert and the  
1:18:38 12 other pleadings in the case.

1:18:49 13 Q. It is correct, isn't it, that you did  
1:18:51 14 not opine that the '444 and '277 patents give 10X's  
1:18:58 15 product -- products their essential marketability;  
1:19:03 16 correct?

1:19:05 17 MS. TU: Objection.

1:19:08 18 A. I don't recall if my report uses  
1:19:11 19 those words, but as it relates to their Next GEM  
1:19:17 20 product, that would be consistent with my  
1:19:19 21 understanding that these patents do provide them  
1:19:23 22 with the technology needed for their marketability,  
1:19:27 23 confirmed by Ms. Davis' opinion that she does not  
1:19:31 24 know of an alternative solution.

1:19:53 25 Q. You did not state an opinion that the

1:21:24 1 deposition.

1:21:28 2 Q. You do -- well, maybe you don't  
1:21:33 3 anymore. I have a question that may actually be  
1:21:38 4 affected now by your agreeing to Ms. Davis' royalty  
1:21:42 5 base. That's not a question.

1:21:45 6 A. I'm hoping that's an observation the  
1:21:47 7 deposition will now be shorter.

1:21:53 8 Q. This is sort of off the record, on  
1:21:55 9 the record, it was a pleasant surprise that we have  
1:21:57 10 agreement on the royalty base so.

1:22:02 11 A. I'll move on to another topic. And  
1:22:08 12 perhaps although I'm sure you have this memorized,  
1:22:12 13 we can just go to page 25 of exhibit one.

1:22:23 14 A. I have it.

1:22:25 15 Q. I'm sorry. That's the wrong page.  
1:22:29 16 If we could go, please, to page 71, Georgia-Pacific  
1:22:36 17 factor 15.

1:22:37 18 A. I have it.

1:22:49 19 Q. On page 71, you state the language of  
1:22:54 20 the factor 15 of the Georgia-Pacific analysis;  
1:22:58 21 correct?

1:23:00 22 A. I do.

1:23:02 23 Q. And this really sets forth that the  
1:23:09 24 hypothetical negotiators are negotiating over an  
1:23:12 25 amount that the licensor, who is willing, would

1 Identification.)

1:24:44 2 BY MS. HADZIMEHMEDOVIC:

1:24:58 3 Q. Mr. Malackowski, do you see exhibit  
1:24:59 4 two on the screen?

1:25:01 5 A. Yes, it looks like a copy of the  
1:25:03 6 original Georgia-Pacific versus U.S. Plywood case  
1:25:07 7 from the 1970s.

1:25:11 8 Q. And this is the seminal case that  
1:25:14 9 actually did set forth the 15 Georgia-Pacific  
1:25:16 10 factors that you apply in your analysis; correct?

1:25:21 11 A. Yes, ma'am.

1:25:24 12 MS. HADZIMEHMEDOVIC: Ashley, can we  
1:25:25 13 please turn to PDF page seven?

1:25:39 14 Q. Mr. Malackowski, do you see that on  
1:25:40 15 that page, we have a paragraph that is citing a case  
1:25:48 16 and it states the following: In fixing damages on a  
1:25:51 17 royalty basis against an infringer, the sum allowed  
1:25:55 18 should be reasonable and that which would be  
1:25:58 19 accepted by a prudent licensee who wished to obtain  
1:26:01 20 a license, but was not so compelled, and a prudent  
1:26:05 21 patentee who wished to grant a license, but was not  
1:26:08 22 so compelled.

1:26:10 23 Do you see that?

1:26:11 24 A. I do.

1:26:13 25 Q. Is this a principle that you have

11:26:14 1 applied in your analysis?

11:26:19 2 A. Well, the language that you cite is  
11:26:22 3 by admission of this case one of several different  
11:26:26 4 phrasing that set forth a more general tool, which  
11:26:32 5 is described starting at head note six.

11:26:38 6 So I don't disagree that some cases  
11:26:41 7 have used that language, but I don't think that  
11:26:43 8 language is used in every case.

11:26:48 9 Q. In your implication of the  
11:26:49 10 Georgia-Pacific analysis, are you placing the  
11:26:53 11 licensee under compulsion to take a license?

11:26:59 12 A. I don't use the word "compulsion."  
11:27:04 13 So I would say no. I don't say they are compelled.  
11:27:11 14 The only time that word would have meaning to me is  
11:27:13 15 if it was some sort of a holdup license where you  
11:27:20 16 were compelling someone to take a license at a time  
11:27:25 17 that was economically irrational for them or you  
11:27:29 18 imputed a royalty that reflected more than the  
11:27:31 19 footprint to the invention, and I'm not doing that.

11:27:37 20 Q. So you do agree that, A,  
11:27:42 21 Georgia-Pacific analysis does not allow the concept  
11:27:48 22 of the licensee in the hypothetical negotiation  
11:27:53 23 being under compulsion and it also does not allow  
11:27:57 24 you to apply a holdup value in the hypothetical  
11:28:00 25 negotiation. Both of those are correct; true?

1:28:04 1 MS. TU: Objection.

1:28:06 2 A. I need to review this case and the

1:28:09 3 language around it to answer that question. So

1:28:11 4 maybe you can just give me a minute.

1:28:24 5 Q. I don't mind giving you a minute. I

1:28:26 6 am asking about your understanding you applied when

1:28:29 7 you wrote your report.

1:28:31 8 A. But you're using this term

1:28:32 9 "compulsion," which you're bring forward from this

1:28:37 10 case which by its face talks about variant uses of

1:28:40 11 the phrase. So I just want to make sure I'm using

1:28:44 12 it in a way that's consistent with the genesis of

1:28:47 13 your question.

1:28:50 14 Q. How do you understand the word

1:28:51 15 "compulsion"?

1:28:53 16 A. I don't use the word "compulsion" in

1:28:55 17 my analysis. The way I would understand it would be

1:29:04 18 similar to a holdup license, as I described for you

1:29:06 19 before, which would be a negotiation that extracted

1:29:08 20 a payment greater than would be justified by the

1:29:13 21 footprint of the invention, and I'm not doing that

1:29:19 22 here, so to that extent, I'm not assuming anyone's

1:29:24 23 under some compulsion.

1:29:31 24 Q. Is it your understanding too that the

1:29:33 25 hypothetical negotiators are not negotiating under a

1:39:29 1 then taking advantage of the discounts, but  
1:39:31 2 regardless, I would have to go back to the records  
1:39:35 3 to match the payments to the terms. That was not  
1:39:40 4 necessary for my work.

1:39:44 5 Q. You don't disagree that there are  
1:39:48 6 records in this case that show RainDance and later  
1:39:51 7 Bio-Rad paying half the stated rates in the Harvard  
1:39:56 8 and MRC licenses and that is one-half percent for  
1:40:01 9 chips and 1 percent for instruments?

1:40:04 10 MS. TU: Objection.

1:40:06 11 A. I don't offer those opinions in my  
1:40:08 12 report. I can accept that for purposes of the  
1:40:10 13 deposition today. Generally speaking, I do believe  
1:40:14 14 that there were certain discounts available for  
1:40:18 15 third-party royalties, and that Bio-Rad took  
1:40:21 16 advantage of those when they were available, but  
1:40:25 17 from memory, I couldn't tell you what the specifics  
1:40:28 18 are. It's not relevant to the analysis.

1:40:32 19 Q. The reason that RainDance and later  
1:40:34 20 Bio-Rad could have the stated rate is what's called  
1:40:39 21 the stacking provision in Harvard/RainDance and the  
1:40:43 22 stacking provision in the MRC/RainDance license. Is  
1:40:47 23 that your understanding?

1:40:51 24 A. Yes, generally, that that is a reason  
1:40:53 25 why a licensee would pay a discounted rate, and I

1:40:58 1 believe that both those agreements do contain what  
1:41:02 2 you're referring to as a stacking provision.

1:41:06 3 Q. And a stacking provision is basically  
1:41:08 4 where you have a paid -- where a licensee is paying  
1:41:15 5 a licensor A and then can deduct a portion of the  
1:41:21 6 royalties paid, usually about 50 percent against the  
1:41:26 7 royalties that licensee is paying to licensor B; is  
1:41:31 8 that fair?

1:41:34 9 A. Generally speaking, that's right.

1:41:40 10 Q. RainDance and then later on Bio-Rad  
1:41:42 11 took advantage of the stacking provisions in both of  
1:41:46 12 the agreements, in the agreement with Harvard and in  
1:41:49 13 the agreement with MRC; correct?

1:41:53 14 MS. TU: Objection.

1:41:54 15 A. That's a question you asked me a  
1:41:56 16 couple of times already. So I would refer you to my  
1:41:58 17 last answer. I don't recall specifically without  
1:42:01 18 mapping the payments to the agreement terms, but  
1:42:03 19 generally speaking, I do believe that when  
1:42:07 20 available, they did take advantage of stacking  
1:42:09 21 discounts.

1:42:10 22 Q. And that was completely proper;  
1:42:11 23 right? That's not having your cake and eating it  
1:42:13 24 too; right?

1:42:18 25 A. I don't allege that it isn't proper.

1:42:21 1 The phrase "having your cake and eating it too"  
1:42:23 2 harkens back to analysis that I did in the prior  
1:42:27 3 case where I opine that adding a stacking provision  
1:42:32 4 in the hypothetical, in addition to a stacking  
1:42:36 5 provision in an ongoing agreement, is in my opinion  
1:42:40 6 having your cake and eating it too. So I don't  
1:42:43 7 think a stacking provision is appropriate for the  
1:42:45 8 hypothetical.

1:42:48 9 Q. You do not think that Bio-Rad was  
1:42:50 10 having its cake and eating it too when it applied a  
1:42:54 11 stacking provision in one agreement, Harvard  
1:42:59 12 agreement, and applied a stacking provision in  
1:43:02 13 another agreement, MRC agreement; correct?

1:43:06 14 A. I don't draw --

1:43:08 15 MS. TU: Objection.

1:43:08 16 A. I don't draw or offer an opinion in  
1:43:10 17 that regard.

1:43:13 18 Q. And, in fact, Bio-Rad applied  
1:43:17 19 additional stacking provisions or took benefit of  
1:43:20 20 additional stacking provisions on the same products  
1:43:25 21 under different agreements, correct, in addition to  
1:43:29 22 these two?

1:43:30 23 MS. TU: Objection.

1:43:35 24 A. I don't draw an opinion to that for  
1:43:36 25 the reasons I described earlier. I would have to go

1:43:40 1 back and map in the records against the terms.

1:43:44 2 Q. Now, for your comparable analysis,  
1:43:44 3 you relied upon six agreements; correct? I'll ask a  
1:43:59 4 more specific question.

1:44:04 5 In the comparable market approach  
1:44:07 6 analysis you performed in this case, you  
1:44:10 7 specifically relied upon six agreements?

1:44:15 8 A. I specifically relied upon in  
1:44:18 9 Georgia-Pacific 15 the six agreements we talked  
1:44:20 10 about earlier that are identified on page 71 of my  
1:44:22 11 report.

1:44:24 12 Q. And it is true, isn't it, that five  
1:44:26 13 of those six agreements includes stacking  
1:44:29 14 provisions?

1:44:34 15 A. I believe so, but I would go back to  
1:44:35 16 confirm.

1:44:49 17 Q. Bio-Rad's droplet products are the  
1:44:52 18 Droplet Digital PCR or ddPCR products and the ddSEQ  
1:44:58 19 product; right?

1:44:58 20 A. Yes, ma'am.

1:45:00 21 Q. With respect to its droplet products,  
1:45:03 22 Bio-Rad or RainDance has never paid a 15 percent  
1:45:09 23 royalty rate; correct?

1:45:11 24 A. I believe that's correct.

1:45:14 25 Q. The highest royalty rate paid to any

1:48:26 1 A. I haven't made that calculation. I  
1:48:27 2 would have to go back and consider both the stated  
1:48:29 3 rates, as well as the other elements of  
1:48:32 4 consideration, and then even still I don't think  
1:48:37 5 that would necessarily be relevant to my analysis in  
1:48:39 6 this case.

1:48:42 7 Q. Bio-Rad did not pay royalties under  
1:48:44 8 the Applera license for its droplet products ddPCR  
1:48:49 9 or ddSEQ; correct?

1:48:53 10 A. It did not pay the competitive rate  
1:48:57 11 of 15 percent. We've talked about that earlier.

1:49:01 12 Q. It didn't pay any royalties under the  
1:49:03 13 Applera license for the ddSEQ and ddPCR; correct?

1:49:09 14 A. I believe that's true, though there  
1:49:13 15 were certain upfront payments that were later made  
1:49:16 16 in the amendment, so we would have to take that into  
1:49:18 17 account, and other terms within the agreement, but I  
1:49:21 18 don't believe there were running royalty payments.

1:49:26 19 Q. I want to make sure that we're on the  
1:49:28 20 same page. I'm speaking about the Applera realtime  
1:49:31 21 instrument license. Do you recall that as being one  
1:49:35 22 of the three licenses that you rely upon that has  
1:49:41 23 the stated rate of 15 percent?

1:49:50 24 A. It does, but it also has a  
1:49:53 25 nonrefundable upfront fee of \$7 million not credited

1:49:56 1 against royalties and an additional \$3 million not  
1:50:00 2 credited related to back royalties. So here again,  
1:50:04 3 there are other terms in addition to the stated  
1:50:09 4 rate, and this is the agreement that was later  
1:50:13 5 amended increasing the stated rate and adding  
1:50:16 6 another 5 million-dollar license fee.

1:50:22 7 Q. The licensed product under the  
1:50:25 8 realtime instrument license were realtime thermal  
1:50:32 9 cyclers; correct?

1:50:49 10 A. It was specific to having or making  
1:50:54 11 and selling realtime thermal cyclers, yes.

1:50:58 12 Q. Bio-Rad's droplets product, such as  
1:51:00 13 the ddPCR and ddSEQ, are not realtime thermal  
1:51:04 14 cyclers; correct?

1:51:07 15 A. That is my understanding.

1:51:09 16 Q. So back to the question: Bio-Rad did  
1:51:13 17 not pay royalties under the Applera realtime  
1:51:17 18 instrument license for its ddPCR or ddSEQ products?

1:51:25 19 MS. TU: Objection.

1:52:42 20 A. I would have to go back to the  
1:52:43 21 agreement to read the specific terms. In the  
1:52:46 22 amendment, for example, it does expand the field of  
1:52:48 23 use. I would need to confirm that that didn't  
1:52:52 24 include products that you just cited. I don't  
1:52:55 25 specifically in my report cite to payments on the

1:52:59 1 droplet products.

1:53:02 2 Q. And it's also true, isn't it, that  
1:53:04 3 Bio-Rad did not pay royalties for its ddSEQ product  
1:53:09 4 under the Applied Biosystems/QuantaLife license you  
1:53:13 5 rely upon?

1:53:14 6 MS. TU: Objection.

1:53:26 7 A. I believe the Applied  
1:53:27 8 Biosystems/QuantaLife license was not focused on  
1:53:34 9 equipment, but rather consumables.

1:53:40 10 Q. DdSEQ includes equipment and  
1:53:42 11 consumables; correct?

1:53:43 12 A. It does.

1:53:44 13 Q. So Bio-Rad did not pay royalties on  
1:53:48 14 ddSEQ instruments or consumables under its Applied  
1:53:52 15 Biosystems/QuantaLife license?

1:54:11 16 A. I don't cite that they do in my  
1:54:12 17 report, though I would want to go back to the actual  
1:54:15 18 agreement to confirm the scope of licensed products.

1:54:28 19 Q. Sitting here today, there is no  
1:54:33 20 information in your report suggesting that Bio-Rad  
1:54:36 21 ever paid license fees under the ABI/QuantaLife  
1:54:42 22 license for its DD -- sorry, ddSEQ products?

1:54:49 23 A. I believe that's correct. I don't  
1:54:51 24 state such in my report.

1:54:54 25 Q. And you also know that Bio-Rad did

13:02:51 1 Q. We spoke earlier about the licenses  
13:02:54 2 that you determined in your opinion are most  
13:02:58 3 comparable in this case, those being the  
13:03:02 4 Applera/Bio-Rad agreement, Caliper/RainDance  
13:03:05 5 agreement, and the Applied Biosystems/QuantaLife  
13:03:08 6 agreement; correct?

13:03:10 7 A. Yes, we did speak about those at some  
13:03:12 8 length.

13:03:23 9 Q. As to the Applera/Bio-Rad license,  
13:03:25 10 you found that this agreement was indicative of a  
13:03:28 11 reasonable royalty rate in this case in excess of  
13:03:30 12 15 percent of net sales; correct?

13:03:36 13 A. From memory, that seems to be an  
13:03:38 14 exact quotation from my report. I'm happy to turn  
13:03:41 15 to that section and confirm if that language is  
13:03:45 16 critical to you, but I think that's generally  
13:03:47 17 correct.

13:04:10 18 Q. Would you agree that Bio-Rad's  
13:04:11 19 Droplet Digital PCR product does not compete at all  
13:04:15 20 with 10X's 10X Genomics products that are accused in  
13:04:21 21 this case? I'll reask it.

13:04:27 22 You agree, don't you, that Bio-Rad's  
13:04:32 23 ddPCR product do not compete with 10X's accused  
13:04:35 24 products in this case?

13:04:37 25 MS. TU: Objection.

13:11:55 1 Q. You have not considered 10X's  
13:11:59 2 citation to specific evidence that 10X believes was  
13:12:04 3 fraudulently offered to the jury?

13:12:07 4 MS. TU: Objection.

13:12:09 5 A. No, I have not.

13:12:22 6 Q. Bio-Rad -- strike that.

13:12:23 7 The asserted '444/'277 patents do not  
13:12:28 8 claim any instrumentation for thermal cycling; do  
13:12:31 9 they?

13:12:35 10 A. So that's a general question that  
13:12:37 11 would require review of the patents themselves,  
13:12:41 12 claims, and the specification that describes them  
13:12:44 13 and is really a technical question. So I would  
13:12:48 14 defer first to Dr. Gale to respond on that. I don't  
13:12:51 15 draw opinions in that regard in my report.

13:12:58 16 Q. You did not take as an assumption in  
13:13:01 17 your analysis that the '277 and '444 patents claim  
13:13:09 18 thermal cycler instrumentation?

13:13:15 19 A. I offer no opinion on that issue  
13:13:17 20 either way.

13:13:20 21 Q. You relied on Dr. Gale's report  
13:13:22 22 regarding the comparability between one of the  
13:13:26 23 licensed patents in the Applera license, the Haguchi  
13:13:30 24 patent, with the '444 and '277 patents; is that  
13:13:32 25 right?

13:13:34 1 A. My recollection is that he does call  
13:13:36 2 out specific patents when making that comparison and  
13:13:39 3 I do rely upon his work in that regard, yes.

13:13:43 4 Q. You also relied on Dr. Gale's review  
13:13:45 5 of the thermal cyclers that were licensed in the  
13:13:50 6 Applera license in its comparison with 10X's  
13:13:57 7 products; correct?

13:13:57 8 A. I do rely upon Dr. Gale's assessment  
13:14:03 9 of product comparisons. I from memory believe that  
13:14:09 10 it is as you describe, though I wouldn't want to  
13:14:12 11 speculate without a review of his report as to the  
13:14:16 12 specific products that he used to support his  
13:14:19 13 opinions.

13:14:21 14 Q. Now, separate from Dr. Gale's input  
13:14:24 15 on this case, is it correct that as a licensing  
13:14:31 16 professional, you are aware generally that the value  
13:14:36 17 of the technology represented by the Haguchi patents  
13:14:39 18 is acknowledged worldwide to be extremely large and  
13:14:43 19 that it has been licensed all over the world for a  
13:14:46 20 lot of money?

13:14:50 21 A. Well, I'm not sure how my credential  
13:14:53 22 or experience as a licensing professional would  
13:14:56 23 weigh on the notion that it's been licensed  
13:15:00 24 frequently for a lot of money. Those don't sound  
13:15:04 25 like factual issues.

13:15:06 1 I am aware generally of promotional  
13:15:09 2 statements describing the use of the patent. As to  
13:15:15 3 whether or not it contains the specific phrases you  
13:15:18 4 mentioned, I would need to go back to the documents  
13:15:20 5 that describe that to confirm.

13:15:26 6 Q. Mr. Malackowski, did you in forming  
13:15:27 7 opinions in this case have any understanding that  
13:15:30 8 the Haguchi patent is acknowledged worldwide to be  
13:15:37 9 very valuable and that it has been licensed around  
13:15:41 10 the world for significant amount of money?

13:15:45 11 MS. TU: Objection.

13:15:47 12 A. I don't believe that that's stated  
13:15:49 13 within my report as a basis for my opinions. To the  
13:15:54 14 extent that that is contained within Dr. Gale's  
13:15:58 15 report to support the conclusions that I draw from  
13:16:00 16 him, then I certainly would acknowledge it as an  
13:16:05 17 indirect basis, but I don't recall that specifically  
13:16:09 18 within his report as I sit here.

13:16:16 19 Q. The Applera/Bio-Rad agreement was  
13:16:18 20 negotiated and signed in 2005; is that correct?

13:16:35 21 A. Did you say the Applera/Bio-Rad  
13:16:37 22 agreement?

13:16:39 23 Q. Yes.

13:16:39 24 A. I note on page 32 of my report that  
13:16:45 25 that was signed in 2006.

13:16:54 1 Q. That is 13 years before the date of  
13:16:56 2 the hypothetical negotiation in this case?

13:17:02 3 A. Approximately.

13:17:06 4 Q. One factor that goes to how  
13:17:08 5 comparable license agreement is is how close in time  
13:17:11 6 it is to the hypothetical negotiation. That's fair;  
13:17:13 7 right?

13:17:17 8 A. Generally, that's fair. There is  
13:17:18 9 further consideration such that agreements that come  
13:17:24 10 after the negotiation are often discounted because  
13:17:26 11 they would not be known or knowable at the  
13:17:29 12 negotiation, and for agreements before the  
13:17:33 13 negotiation, consideration is given to develop into  
13:17:38 14 the market between the date of the agreement and the  
13:17:41 15 negotiation.

13:17:42 16 So, for example, in this case, if the  
13:17:45 17 market actually became larger, more successful, more  
13:17:50 18 robust, all else being equal, that would suggest  
13:17:54 19 that the earlier agreement would understate the  
13:17:58 20 royalty.

13:18:35 21 Q. You are aware there was extensive  
13:18:39 22 litigation in Connecticut against a company called  
13:18:41 23 MJ?

13:18:43 24 A. I am aware of that. That was  
13:18:45 25 something that was discussed in more detail in a

13:18:48 1 prior Delaware case as it related to the background  
13:18:53 2 of the licenses at issue.

13:18:56 3 Q. MJ was found in that litigation to  
13:19:00 4 infringe the asserted patents that belonged to  
13:19:04 5 Applera; correct?

13:19:08 6 A. That's consistent with my memory,  
13:19:09 7 though I don't discuss that within my report here.  
13:19:14 8 So I have not refreshed on those specific disputes  
13:19:17 9 and resolution for some time. So without going back  
13:19:20 10 to the document, I would simply accept your  
13:19:24 11 representation for purposes of your questions.

13:19:27 12 Q. Bio-Rad bought MJ that had already  
13:19:31 13 been found to infringe; correct?

13:19:34 14 A. I'm sorry, did you say Bio-Rad bought  
13:19:36 15 or purchased MJ?

13:19:38 16 Q. Correct. I'll restate it.  
13:19:42 17 Bio-Rad bought MJ that had already  
13:19:44 18 been found to infringe; correct?

13:19:48 19 MS. TU: Objection.

13:19:50 20 A. Generally, that is consistent with my  
13:19:53 21 understanding.

13:20:03 22 Q. And there were at least three  
13:20:08 23 different agreements all signed at the same time  
13:20:11 24 between Bio-Rad and Applera referencing each other  
13:20:16 25 as being all related; correct?

13:20:22 1 A. I do recall the multiple agreements  
13:20:26 2 and their interrelationships, that was discussed  
13:20:28 3 within my report in the Delaware case. So my memory  
13:20:32 4 is consistent with your question. I have not gone  
13:20:36 5 back and refreshed on those various agreements for  
13:20:39 6 my work here. So I really don't recall the details.

13:20:43 7 Q. And one of those agreements is the  
13:20:45 8 realtime instrument, Applera/Bio-Rad agreement, that  
13:20:49 9 you are relying upon in this case; correct?

13:20:55 10 A. That is my recollection, that it was  
13:20:56 11 one of the three.

13:20:59 12 Q. And you are aware that at the time  
13:21:01 13 Bio-Rad signed the agreement you're relying on, the  
13:21:06 14 Court was going to have a hearing on whether Bio-Rad  
13:21:09 15 was in contempt of an injunction at that time?

13:21:15 16 MS. TU: Objection.

13:21:18 17 A. I do recall and make reference to the  
13:21:22 18 fact of the pending injunction within both my first  
13:21:26 19 report and my second report. So I am familiar with  
13:21:29 20 that, yes.

13:21:41 21 Q. By "pending," you mean there was an  
13:21:43 22 injunction that was actually entered and now there  
13:21:47 23 was a pending hearing on the contempt of that  
13:21:50 24 injunction because Bio-Rad was being accused of not  
13:21:54 25 following the injunction order; correct?

13:21:58 1 MS. TU: Objection.

13:21:59 2 A. I don't think I used the word

13:22:00 3 "pending." I think that was your language, but

13:22:03 4 putting that aside, again, at a general level, the

13:22:08 5 premise of your question is consistent with my

13:22:11 6 recollection of the facts.

13:22:14 7 Q. And the pending hearing on the

13:22:16 8 contempt of the injunction was prompted by Applera's

13:22:22 9 complaint that Bio-Rad was not complying with the

13:22:27 10 Court's injunction. You recall that?

13:22:33 11 A. I recall the issue of various

13:22:36 12 anonymous or other employee complaints, though I

13:22:40 13 don't, as I sit here, recall it relating to the

13:22:42 14 injunction as much as the royalty payments. So I

13:22:48 15 can accept that for purposes of your question. The

13:22:50 16 facts will speak for itself. I actually don't

13:22:53 17 recall if that was due to some sort of employee

13:22:56 18 complaint.

13:23:04 19 Q. Is it your testimony you don't recall

13:23:05 20 that Applera had submitted briefing to the Court

13:23:11 21 separate from any Bio-Rad employee that complained

13:23:15 22 of Bio-Rad's violation of the injunction?

13:23:21 23 MS. TU: Objection.

13:23:22 24 A. Although I discuss the issue of the

13:23:24 25 injunction within my two reports, I don't discuss

13:23:29 1 the various pleadings that were filed by whom and  
13:23:32 2 what their content was. So I would be speculating.  
13:23:36 3 I can't deny that that is what happened from memory,  
13:23:39 4 but it's not something that's been the focus of my  
13:23:42 5 work.

13:23:49 6 Q. And is it your recollection that the  
13:23:51 7 Bio-Rad employee who submitted a letter to the Court  
13:23:56 8 called himself Elmer Futterbuck?

13:24:00 9 MS. TU: Objection.

13:24:04 10 A. So a moment ago, I told you I don't  
13:24:07 11 recall the specific pleadings or documents related  
13:24:11 12 to this issue and I still don't. That said, the  
13:24:17 13 persona Elmer Futterbuck is one that I have memory  
13:24:23 14 of from my review of the record. It's something  
13:24:26 15 that you tend not to forget.

13:24:31 16 Q. Now, it is true, isn't it, that you  
13:24:33 17 did not discuss Mr. Futterbuck's letter in the  
13:24:39 18 report in this case; correct?

13:24:45 19 A. Correct. I do not.

13:24:46 20 Q. It is also true that you did not  
13:24:48 21 discuss any internal Bio-Rad documentation that  
13:24:53 22 confirms Mr. Futterbuck's statements to the Court?

13:24:57 23 MS. TU: Objection.

13:25:02 24 A. I don't specifically discuss  
13:25:04 25 responsive commentary to such statement.

13:25:24 1 Q. I want to make sure I understand your  
13:25:26 2 answer. It is true, isn't it, that in your report,  
13:25:29 3 you did not discuss any internal Bio-Rad  
13:25:34 4 documentation or communication that, indeed, confirm  
13:25:39 5 that Mr. Futterbuck's statements to the Court were  
13:25:42 6 correct?

13:25:45 7 MS. TU: Objection.

13:25:47 8 A. So to be clear, I do discuss various  
13:25:51 9 evidence related to this issue, specifically on  
13:25:54 10 pages 34 and 35 of my report, but I don't call out a  
13:26:00 11 response to the persona Elmer Futterbuck. I don't  
13:26:06 12 specifically discuss that.

13:26:13 13 Q. You also do not discuss the contempt  
13:26:16 14 proceedings against Bio-Rad for potentially  
13:26:19 15 violating the injunction. That's fair; right?

13:26:25 16 A. My report will speak for itself. I  
13:26:27 17 don't recall referencing contempt proceedings  
13:26:30 18 specifically, just the issue of the injunction.

13:26:37 19 Q. You would agree with me that a party  
13:26:40 20 that has to go to court when it has been charged  
13:26:44 21 with being in contempt of an injunction doesn't have  
13:26:47 22 a lot of negotiating leverage in that discussion; is  
13:26:51 23 that fair?

13:26:53 24 MS. TU: Objection.

13:26:54 25 A. No, I don't think you can make that

13:28:30 1 that testimony so we can talk about it.

13:28:40 2 Q. With respect to the realtime  
13:28:44 3 instrument license, Bio-Rad also had a consent  
13:28:57 4 judgment entered on the very same patent, the  
13:29:01 5 Haguchi patent, by which Bio-Rad is found to  
13:29:07 6 infringe and it's permanently enjoined from  
13:29:10 7 infringing the Haguchi patent; is that true?

13:29:17 8 MS. TU: Objection.

13:29:18 9 A. My -- my report is not so specific to  
13:29:20 10 the patent at issue or the terms of the injunction,  
13:29:24 11 only to discuss generally that Bio-Rad was facing an  
13:29:27 12 injunction. So I would have to go back and refresh  
13:29:32 13 on the documents. That's not something that is  
13:29:35 14 addressed within my report.

13:29:37 15 Q. Sitting here today, you don't know  
13:29:42 16 one way or the other whether with respect to the  
13:29:46 17 very patent at issue in the license you rely upon,  
13:29:50 18 the Haguchi patent, there was a consent judgment of  
13:29:55 19 infringement validity and permanent injunction  
13:29:59 20 against Bio-Rad for the Haguchi patent?

13:30:11 21 A. All that I rely upon is that Bio-Rad  
13:30:14 22 was facing an injunction during these negotiations.  
13:30:20 23 The background of and leading to that injunction is  
13:30:24 24 not discussed with my report, and I don't think it's  
13:30:29 25 particularly relevant. Though I do recognize that

13:30:31 1 in the prior case, there was more detail presented  
13:30:34 2 on that issue, I simply don't recall as I sit here  
13:30:39 3 the facts to be responsive to your question.

13:30:42 4 That said, there is nothing in your  
13:30:44 5 question that my memory suggests is inaccurate. So  
13:30:47 6 I'm happy to presume that for purposes of any  
13:30:51 7 substantial question you have related to my opinions  
13:30:53 8 in this case.

13:31:17 9 Q. Applera/Bio-Rad license applied the  
13:31:21 10 royalty rate of 15 percent to net sales of licensed  
13:31:26 11 realtime thermal cyclers; correct?

13:31:29 12 A. Yes, you and I spoke about that at  
13:31:32 13 some length before the break.

13:31:35 14 Q. And those would qualify as  
13:31:36 15 instruments; correct?

13:31:41 16 A. I believe that they would be  
13:31:42 17 generally regarded as instruments.

13:31:45 18 Q. In this case you are applying the  
13:31:47 19 15 percent royalty to instruments, reagents, and  
13:31:50 20 chips?

13:31:51 21 A. Yes, as we've discussed, based upon  
13:31:53 22 the diversity of the licenses within the benchmark  
13:31:57 23 group, as well as the other factors cited in  
13:32:01 24 Georgia-Pacific.

13:32:03 25 Q. If you could, please, look on page

13:32:05 1 33.

13:32:16 2 A. Yes.

13:32:16 3 Q. And if you'd, please, look at the  
13:32:21 4 third full paragraph on page 33 starting with "I  
13:32:24 5 understand."

13:32:28 6 A. Yes.

13:32:28 7 Q. I understand that so long as the  
13:32:29 8 licensee remained a licensee under the separate  
13:32:32 9 amended and restated thermal cycler supplier  
13:32:34 10 agreement, royalties paid under that supplier  
13:32:37 11 agreement for a given royalty-bearing item would be  
13:32:40 12 fully deductible from the running royalties due on  
13:32:42 13 the same item under this license.

13:32:45 14 Do you see that?

13:32:48 15 A. Yes, ma'am.

13:32:50 16 Q. So the Applera license had a setoff  
13:32:55 17 that worked as a stacking provision; correct?

13:33:00 18 A. Well, it's different than the  
13:33:01 19 stacking provision concept that we spoke about  
13:33:05 20 earlier, which is generally related to licenses paid  
13:33:08 21 to third parties on third-party IP. This is really  
13:33:15 22 to avoid a double recovery or a double counting of  
13:33:19 23 issues, meaning double payment of royalties by the  
13:33:22 24 same licensee to the same licensor.

13:33:27 25 Q. So if Bio-Rad paid Applera 7 percent

13:37:01 1 were exactly.

13:37:10 2 Q. If we look on top of page 34 on  
13:37:15 3 exhibit one of your report, in the second full  
13:37:19 4 sentence you address the 2007 amendment that  
13:37:23 5 increased the running royalty to 15.75 percent;  
13:37:26 6 correct?

13:37:29 7 A. Yes, ma'am.

13:37:31 8 Q. And for the 2008 amendment, all you  
13:37:35 9 say is that it expanded the field of use among other  
13:37:37 10 provisions; correct?

13:37:42 11 A. Yes, ma'am.

13:37:45 12 Q. You do not consider that, in fact,  
13:37:49 13 that amendment, the 2008 amendment, provided for the  
13:37:55 14 rate in the realtime instrument license to go down  
13:37:59 15 upon the expiration of the Haguchi patent?

13:38:07 16 A. I do not cite or include such detail  
13:38:10 17 within my report, though as we've just discussed, I  
13:38:13 18 am familiar with that. I don't believe that that is  
13:38:19 19 relevant to my consideration.

13:38:23 20 Q. The parties agree in 2008 that the  
13:38:27 21 ongoing royalty in the realtime instrument license  
13:38:29 22 would, in fact, be 7.75 percent upon the expiry of  
13:38:34 23 the Haguchi patent; correct?

13:38:36 24 MS. TU: Objection.

13:38:39 25 A. I don't recall the percent -- precise

14:26:38 1 success of that product would in part depend upon  
14:26:43 2 the results of the negotiation. So I think they  
14:26:45 3 went to the discussion -- would go to the discussion  
14:26:49 4 assuming there is a competitive relationship with  
14:26:51 5 the parties.

14:27:07 6 Q. You did not rely upon or discuss the  
14:27:08 7 testimony of Bio-Rad's witnesses who confirmed that  
14:27:11 8 ddSEQ is being discontinued?

14:27:16 9 A. That's not cited within my report for  
14:27:18 10 the reasons I just described.

14:27:41 11 Q. Is it correct, Mr. Malackowski, that  
14:27:43 12 generally lower royalty rates apply when the  
14:27:46 13 licensee is required to make significant additional  
14:27:49 14 investments in the technology in the market?

14:27:54 15 A. I think it depends upon the context  
14:27:56 16 that you're considering. Typically, that's -- in  
14:28:00 17 addition that's related to inventor/promoter  
14:28:02 18 agreements. And one of the reasons, for example,  
14:28:05 19 that university licensor agreements tend to be at  
14:28:08 20 lower rates than competitor agreements because the  
14:28:12 21 university seeks the investment of the licensee to  
14:28:16 22 commercialize the product.

14:28:38 23 Q. Wouldn't you agree though that even  
14:28:42 24 outside that, the inventor/promoter scenario, just  
14:28:55 25 how much work still needed to be done in order to

14:38:50 1 Q. Mr. Malackowski, it is true, isn't  
14:38:51 2 it, that in your report, and we can specifically  
14:38:58 3 look at GP5, but even more general, in your report,  
14:39:02 4 you do not rely upon Bio-Rad's sales of the ddSEQ,  
14:39:09 5 and by that I mean, revenue on the ddSEQ sales?

14:39:17 6 A. Generally speaking, that's correct.  
14:39:20 7 I do not call out the specific revenues of ddSEQ in  
14:39:27 8 forming my opinion of the use and benefit of the  
14:39:32 9 patents-in-suit to 10X.

14:39:35 10 Q. And you do not compare ddSEQ sales to  
14:39:40 11 the sales of 10X's products; correct?

14:39:47 12 A. Correct, I don't believe that is  
14:39:49 13 necessary, nor informative of the negotiation.

14:39:56 14 Q. Well, let's talk about it. Before  
14:40:01 15 the hypothetical, let's say quarter four of 2018,  
14:40:07 16 Bio-Rad sold a single one ddSEQ instrument. You did  
14:40:12 17 not consider that; correct?

14:40:13 18 A. I am aware of that fact. I believe  
14:40:18 19 it's not only within the record generally, but it's  
14:40:20 20 cited by Ms. Davis, but I have not taken into  
14:40:23 21 account the negative impact on Bio-Rad from the  
14:40:29 22 infringement by 10X. To do so would, A, increase  
14:40:32 23 the royalty rate, and, B, I have concern that it  
14:40:36 24 would extend the analysis of the royalty to beyond  
14:40:39 25 the footprint of the invention that's used by 10X to

14:42:00 1 stated another way, an extension of the basis beyond  
14:42:05 2 the simple use or footnote of the invention to 10X,  
14:42:09 3 and I did not believe it would be appropriate to do  
14:42:13 4 so and I feel it's conservative not to and so I have  
14:42:17 5 not.

14:42:27 6 Q. By "infringement in the current  
14:42:28 7 action," you're speaking about 10X's infringement of  
14:42:32 8 the '444 and '277 that you have to presume in the  
14:42:37 9 hypothetical negotiation?

14:42:40 10 A. Correct.

14:43:01 11 Q. In Q4 2018 and Q1 2019 combined, so  
14:43:08 12 before the hypothetical negotiation, before 10X is  
14:43:12 13 selling Next GEM, [REDACTED]

14:43:16 [REDACTED] You did not rely on that fact?

14:43:22 15 A. I'm aware of that fact. I believe  
14:43:24 16 that's cited in Ms. Davis' deposition or report, but  
14:43:27 17 I don't believe it should be imported into the  
14:43:31 18 negotiation because to do so would only increase the  
14:43:34 19 royalty rate and, therefore, its conservative to  
14:43:38 20 not.

14:43:44 21 Q. The last Bio-Rad competes with 10X  
14:43:48 22 means that rate goes higher. Do I understand that  
14:43:52 23 correctly?

14:43:53 24 A. No, but you're using in your question  
14:43:56 25 "compete" in sort of a relative sales way, as does

14:44:03 1 Ms. Davis. I disagree. I think that "compete" is  
14:44:05 2 more of a binary decision, that these companies do  
14:44:08 3 compete, and there is a competitive threat or there  
14:44:10 4 is not, and the fact that a hypothetical licensor  
14:44:15 5 has relatively low success in the market compared to  
14:44:21 6 a hypothetical competitive licensee that has  
14:44:25 7 relatively high success, analyzing the low  
14:44:29 8 performance of the licensor is in this case I  
14:44:32 9 believe only going to further the demand of the  
14:44:35 10 licensor to seek consideration for what is  
14:44:39 11 effectively a lost profits claim, and I'm not making  
14:44:43 12 such a claim.

14:44:44 13 Q. You're not making such a claim  
14:44:45 14 because you have not identified a single lost sale  
14:44:48 15 by Bio-Rad because of 10X; correct?

14:44:53 16 MS. TU: Objection.

14:44:55 17 A. I'm not making a lost profits claim.  
14:44:58 18 I am seeking to not impute a lost profits element  
14:45:03 19 within the Georgia-Pacific royalty framework.

14:45:08 20 Q. That does not exist here because of  
14:45:11 21 Bio-Rad's own testimony that you did not rely upon?

14:45:19 22 A. You'd have to refresh my recollection  
14:45:20 23 as to which particular testimony you're referring  
14:45:22 24 to.

14:45:25 25 Q. Nowhere in your report do you address

14:45:28 1 the testimony of Bio-Rad's corporate witness who  
14:45:31 2 said that there was not a single lost sale by  
14:45:37 3 Bio-Rad based on 10X?

14:45:42 4 MS. TU: Objection.

14:45:45 5 A. I --

14:45:46 6 Q. You did not rely upon that testimony?

14:45:48 7 A. I do recall reviewing that testimony.

14:45:51 8 My recollection is that it is not as explicit as  
14:45:54 9 your question suggests and was more a response from  
14:45:59 10 the executive that they couldn't identify a  
14:46:02 11 particular client or customer, not that they didn't  
14:46:06 12 think there was competitive harm.

14:46:09 13 Q. You've been in, I don't know,  
14:46:10 14 hundreds of litigations. You know what a corporate  
14:46:14 15 representative is. You do know that,  
14:46:16 16 Mr. Malackowski?

14:46:18 17 A. I believe so, yes.

14:46:20 18 Q. And you do know that he was supposed  
14:46:23 19 to be -- that he was prepared to address the issue  
14:46:27 20 of any lost sales?

14:46:30 21 MS. TU: Objection.

14:46:31 22 Q. Did you know that in reviewing  
14:46:32 23 your -- in reviewing Mr. Lebofski's testimony?  
14:46:42 24 L-e-b-o-f-s-k-i. I'll repeat the question.  
14:47:00 25 Did you know in reviewing

14:47:02 1 Mr. Lebofski's testimony, that he was Bio-Rad's  
14:47:06 2 corporate representative regarding any potential  
14:47:11 3 lost sales?

14:47:24 4 A. In reviewing any of the depositions  
14:47:27 5 of the party witnesses I do pay attention to whether  
14:47:30 6 or not they're 30(b)(6) designee and have both  
14:47:34 7 corporate and personal testimony. That said, I do  
14:47:39 8 not recall what particular categories Mr. Lebofski  
14:47:45 9 was designated to address. Certainly not from  
14:47:48 10 memory. The deposition may have made that clear,  
14:47:51 11 but as I sit here today, I don't recall.

14:47:55 12 Q. And it's a fair assessment of his  
14:47:57 13 testimony that he, as Bio-Rad's representative,  
14:48:00 14 could not identify a single sale that Bio-Rad had  
14:48:10 15 lost to 10X?

14:48:13 16 MS. TU: Objection. Misstates  
14:48:13 17 testimony.

14:48:16 18 A. Well, the record will speak for  
14:48:18 19 itself. Again, my recollection from reviewing the  
14:48:20 20 testimony was that he could not identify a lost sale  
14:48:25 21 by name, but that did not mean that there was  
14:48:30 22 competitive harm in a loss of sales. So to be more  
14:48:33 23 specific, I would have to go back to the transcript.

14:48:40 24 Q. Your opinion is that Bio-Rad and 10X  
14:48:42 25 are competitors -- sorry. You claim that Bio-Rad

14:48:46 1 and 10X are competitors and that does not turn in  
14:48:52 2 any way on whether 10X has directly and demonstrably  
14:48:59 3 impacted Bio-Rad sales of the ddSEQ product?

14:49:02 4 MS. TU: Objection.

14:49:06 5 A. So that's a complicated question  
14:49:08 6 because there is multiple parts to it. I do believe  
14:49:11 7 the companies are competitors and that the  
14:49:14 8 competitive element would be recognized in the  
14:49:17 9 hypothetical negotiation. I do believe that first  
14:49:20 10 and foremost as a result, the parties would focus  
14:49:24 11 their attention under the market approach to other  
14:49:28 12 license agreements that reflect a competitive  
14:49:31 13 relationship not otherwise distorted by  
14:49:35 14 cross-licenses or research limitations or  
14:49:40 15 development cooperation, but true arm's length  
14:49:43 16 third-party commercial agreements, and that finally  
14:49:47 17 that, I did not impute into my royalty calculation a  
14:49:51 18 risk of lost sales or lost profits by Bio-Rad. That  
14:49:56 19 is a reasonable thing to consider, but if one were  
14:50:00 20 to add that to the equation, all else being equal,  
14:50:05 21 it would only increase the damages and so to leave  
14:50:08 22 it out was conservative.

14:50:18 23 Q. The testimony of Bio-Rad's own  
14:50:20 24 witnesses and their records show no direct and  
14:50:24 25 demonstrable impact on Bio-Rad's ddSEQ sales.

14:50:28 1 That's correct?

14:50:32 2 MS. TU: Objection.

14:50:32 3 A. I can't answer that question. It's

14:50:33 4 so broad as to the context of the testimony, I

14:50:37 5 haven't read all of the testimony as we've

14:50:40 6 discussed. So I would be speculating.

14:50:44 7 Q. You haven't identified any piece of

14:50:46 8 evidence that shows direct and demonstrable impact

14:50:50 9 by 10X's Next GEM sales on the ddSEQ sales?

14:50:55 10 MS. TU: Objection.

14:50:55 11 Q. Not a single one?

14:50:58 12 MS. TU: Objection.

14:50:59 13 A. I don't agree with that. I think the

14:51:01 14 discussion of competition is relevant, does show

14:51:06 15 impact and is consistent with a royalty analysis as

14:51:11 16 distinct from a lost profits analysis. I am not

14:51:15 17 proposing a lost profits claim that identifies

14:51:18 18 specific lost sales that would have been made by

14:51:21 19 Bio-Rad, for example, under the Panduit test. That

14:51:25 20 could have been done. That would have increased

14:51:27 21 damages, but I haven't done it.

14:51:31 22 Q. At the time of the hypothetical,

14:51:32 23 Bio-Rad had to be open and not lie to 10X; correct?

14:51:40 24 A. Correct. You asked me that exact

14:51:43 25 question before or substantially that question.

14:55:46 1 that is actually able to sell?

14:55:49 2 MS. TU: Objection.

14:55:53 3 A. As a hypothetical, that may be true  
14:55:55 4 in certain circumstances. I don't think that's  
14:55:58 5 relevant to the context here, but I don't dispute  
14:56:04 6 that that could happen.

14:56:46 7 Q. You have not explained in your report  
14:56:49 8 why that principle does not apply here given that  
14:56:51 9 Bio-Rad has virtually no sales of a competing  
14:56:54 10 product?

14:56:57 11 MS. TU: Objection.

14:56:59 12 A. I think it is a true statement that I  
14:57:01 13 do not discuss that principle in this report largely  
14:57:04 14 for the reasons which I discussed.

14:57:09 15 Q. I'll repeat it. I mean, I said you  
14:57:10 16 have not explained in your report why the principle  
14:57:13 17 you address does not apply here given that Bio-Rad  
14:57:18 18 has virtually no sales of a competing product before  
14:57:22 19 the time of the hypothetical?

14:57:25 20 MS. TU: Objection.

14:57:28 21 A. I have not within my report provided  
14:57:30 22 an opinion on the business impact to Bio-Rad from  
14:57:36 23 the license vis-à-vis the sales level that could be  
14:57:42 24 achieved with or without the license due to  
14:57:46 25 competition. That's true. I have not done that.

14:58:19 1 Q. The product you had opined is a  
14:58:21 2 direct head-to-head competitor with 10X is the ddSEQ  
14:58:24 3 product; right?

14:58:30 4 A. Is there a particular conclusion in  
14:58:31 5 my report you want me to refer to? But other than  
14:58:34 6 that, generally speaking, yes, those are the  
14:58:36 7 products that I viewed as directly competitive.

14:58:41 8 Q. You did not address in your report  
14:58:44 9 that around the time of the hypothetical, Bio-Rad  
14:58:47 10 knew that it was years away from even having a me  
14:58:50 11 too product in the single cell market?

14:58:54 12 MS. TU: Objection.

14:58:55 13 A. I don't know that that's  
14:58:58 14 substantively true, and I do not draw such a  
14:59:02 15 conclusion or refer to such a statement in my  
14:59:05 16 report.

14:59:08 17 Q. If Bio-Rad's own documents stated  
14:59:12 18 what I just said, then you would agree with  
14:59:15 19 Bio-Rad's own internal documentation and  
14:59:21 20 representations about it not having and being years  
14:59:24 21 away from having even a me too product in the single  
14:59:27 22 cell market?

14:59:31 23 MS. TU: Objection.

14:59:32 24 A. I would have to look at the document  
14:59:33 25 you're referring to understand how and why it was

14:59:36 1 prepared and what its context is, and then given the  
14:59:39 2 work I'm doing in this case, I would want to  
14:59:42 3 understand to what extent the infringement factored  
14:59:45 4 into the me too conclusion.

14:59:52 5 Q. You didn't explain in your report how  
14:59:56 6 your opinions can square with Ms. Trauzzi's  
14:59:59 7 testimony that Bio-Rad's ddSEQ market share would  
15:00:02 8 never have edged over 1 percent?

15:00:06 9 MS. TU: Objection.

15:00:14 10 MS. HADZIMEHMEDOVIC: T-r-a-u-z-z-i,  
15:00:15 11 Trauzzi.

15:00:20 12 A. Correct, I do not address her  
15:00:21 13 testimony in my report.

15:00:30 14 Q. If we assume that it is true, that at  
15:00:33 15 the time of the hypothetical, Bio-Rad was years away  
15:00:39 16 from having any product capable of meeting customer  
15:00:42 17 expectations in the market, would that or would that  
15:00:48 18 not alter your opinion regarding the reasonable  
15:00:52 19 royalty in this case?

15:00:56 20 A. So first to my last answer, just to  
15:00:58 21 clarify, I did not address her testimony on that  
15:01:00 22 issue. She is otherwise addressed in my report.

15:01:04 23 To your current question, it would  
15:01:06 24 not affect my opinion in this case because I have  
15:01:08 25 been careful to not interject that issue into the

15:03:10 1 made that consideration. I've simply concluded they  
15:03:13 2 are competitors. As a result, the license should be  
15:03:19 3 commensurate with a commercial competitive license  
15:03:21 4 as opposed to an inventor/promoter license.

15:03:24 5 Q. You concluded they're competitors  
15:03:26 6 without considering Bio-Rad's sales and considering  
15:03:29 7 that they sold two instruments in the two quarters  
15:03:33 8 preceding the hypothetical negotiation. I think  
15:03:35 9 that's fair.

15:03:36 10 MS. TU: Objection.

15:03:40 11 A. I don't think that's a question.

15:03:46 12 Q. Your opinion -- strike that.

15:03:47 13 You concluded in your opinions in  
15:03:52 14 this case that Bio-Rad's ddSEQ is a competitor to  
15:03:58 15 10X's products and made that conclusion without  
15:04:05 16 considering Bio-Rad's sales and the fact that they  
15:04:10 17 sold near two instruments in the two quarters  
15:04:14 18 preceding the hypothetical negotiation?

15:04:16 19 MS. TU: Objection.

15:06:06 20 A. It is correct that in my report, in  
15:06:08 21 Georgia-Pacific factor number five discussing  
15:06:11 22 commercial relationships, I do not specifically  
15:06:13 23 identify the quantity of units that Bio-Rad has sold  
15:06:16 24 as of the date of the hypothetical. I focus on the  
15:06:19 25 fact that the companies perceive each other as

15:06:22 1 competitors and look to what is expected in the  
15:06:26 2 future in that it would be within a period of time  
15:06:31 3 that Bio-Rad would have products directed to the  
15:06:34 4 same applications as 10X. So it is a  
15:06:37 5 forward-looking assessment, but I do agree I don't  
15:06:41 6 specifically cite the two units or the one unit the  
15:06:45 7 year before.

15:06:50 8 Q. Is it your understanding that 10X in  
15:06:52 9 real life does not know that Bio-Rad sold 10  
15:06:58 10 instruments in two quarters preceding the  
15:07:00 11 hypothetical negotiation?

15:07:03 12 MS. TU: Objection.

15:07:05 13 A. I can't speak to that. I don't know  
15:07:08 14 what 10X in real life would know or not know,  
15:07:11 15 especially given the extensive litigation between  
15:07:15 16 the parties and the public trial.

15:07:18 17 Q. Bio-Rad has maintained the sales  
15:07:21 18 information confidential; correct?

15:07:24 19 MS. TU: Objection.

15:07:25 20 Q. In real life?

15:07:28 21 MS. TU: Objection.

15:07:29 22 A. I haven't studied Bio-Rad's  
15:07:31 23 confidentiality provisions regarding its sales  
15:07:34 24 information, who they share it with, to the extent  
15:07:36 25 to which they disclose it, whether they share it

15:07:38 1 with market research firms, I don't know.

15:07:49 2 Q. Your testimony is that your

15:07:52 3 reasonable royalty analysis does not include a plus

15:07:55 4 factor to the rate to compensate for the risk of

15:07:59 5 potential lost sales or market share; correct?

15:08:08 6 A. Generally.

15:08:09 7 (Stenographer clarification.)

15:08:13 8 Q. You did not address in your report

15:08:14 9 that Bio-Rad's ddSEQ product has not been broadly

15:08:19 10 adopted due to inferior product specs and inferior

15:08:24 11 manual of options?

15:08:26 12 A. Correct, I don't necessarily believe

15:08:28 13 that that is true, but I have not addressed that

15:08:32 14 issue in my report.

15:08:50 15 Q. We'll let the jury decide.

15:08:51 16 You did not address in your report

15:08:53 17 that Bio-Rad's sales channel is not even willing to

15:08:56 18 pick up ddSEQ?

15:09:00 19 MS. TU: Objection.

15:09:01 20 A. I'm not sure I know what that means.

15:09:04 21 It sounds like you're referring to a particular

15:09:06 22 document or testimony. That's not a passage that

15:09:10 23 comes to mind. So we'd have to refresh my

15:09:13 24 recollection.

15:09:19 25 Q. You did not consider in your report

15:09:23 1 that Bio-Rad's sales personnel refused or do not  
15:09:30 2 even want to pick up selling ddSEQ because it's such  
15:09:35 3 a failure?

15:09:37 4 MS. TU: Objection.

15:09:39 5 A. I don't know that that's a true  
15:09:40 6 statement, A. B, I don't know that if it is true,  
15:09:43 7 if that's based upon the environment of the  
15:09:47 8 infringement and past infringement, which frustrated  
15:09:51 9 those salespeople, but C, I don't specifically  
15:09:53 10 comment on those quotes, documents, or testimony  
15:10:00 11 that you're generally referring to in my report.

15:10:02 12 Q. 10X offers several lines of single  
15:10:20 13 cell products; correct?

15:10:22 14 A. Yes, ma'am.

15:10:25 15 Q. It offers Multiome product that  
15:10:28 16 performs ATAC-seq and gene expression. It offers  
15:10:32 17 immune profiling products, five prime gene  
15:10:35 18 expression products, targeted gene expression  
15:10:35 19 products.

15:10:42 20 (Stenographer clarification.)

15:10:48 21 Q. 10X offers Multiome products that  
15:10:52 22 perform ATAC-seq and gene expression; immune  
15:10:56 23 profiling products; five prime gene expression  
15:11:01 24 products; targeted gene expression products;  
15:11:04 25 products for crisper-related assays with single cell

15:11:09 1 NGS; products for assays on cell service proteins  
15:11:13 2 with single cell sequencing analysis.

15:11:16 3 Is that your understanding,

15:11:18 4 Mr. Malackowski?

15:11:22 5 A. Generally, yes.

15:11:24 6 Q. Bio-Rad does not offer these products  
15:11:26 7 at all?

15:11:29 8 MS. TU: Objection.

15:11:32 9 A. I have not done a product to product  
15:11:34 10 comparison. I believe there are differences in the  
15:11:41 11 product applications that are offered, and I  
15:11:43 12 recognize that within my report, specifically page  
15:11:51 13 58 where I note that the initial products of  
15:11:55 14 RainDance and 10X focused on different applications.

15:11:58 15 I further talk about the fact that  
15:12:02 16 that does not dispel the notion of a competitor  
15:12:06 17 commercial relationships in a hypothetical and that  
15:12:09 18 Bio-Rad had an intention of bringing products to  
15:12:14 19 market directed to the same applications of 10X.

15:12:20 20 Q. You do not cite any evidence in your  
15:12:21 21 report that shows that Bio-Rad intended to develop  
15:12:29 22 the six product lines that I read into the record?

15:12:35 23 MS. TU: Objection.

15:12:37 24 A. I do not by product line call out the  
15:12:43 25 specific Bio-Rad competitive response. I have a

15:12:46 1 more general discussion because its the more general  
15:12:49 2 discussion that's relevant to my work, which is  
15:12:53 3 ultimately related to the selection of the  
15:12:56 4 comparable agreements.

15:13:21 5 MS. TU: Counsel, if it's a good time  
15:13:23 6 to break, just whenever you're ready. It's been a  
15:13:26 7 little bit over an hour.

15:13:29 8 MS. HADZIMEHMEDOVIC: Sure. This is  
15:13:29 9 a fine time to break.

15:13:34 10 THE VIDEOGRAPHER: Okay. We're going  
15:13:34 11 off the record at 5:13 p.m.

15:13:36 12 (Whereupon, a recess is taken.

15:34:03 13 THE VIDEOGRAPHER: Stand by, please.  
15:34:03 14 We are back on the record at

15:34:10 15 5:34 p.m. marking the start of media unit number  
15:34:14 16 five.

15:34:15 17 BY MS. HADZIMEHMEDOVIC:

15:34:17 18 Q. Mr. Malackowski, before the break, I  
15:34:24 19 identified six 10X Next GEM product lines that  
15:34:29 20 Bio-Rad does not offer equivalent products for. So  
15:34:36 21 for the six product lines that 10X offers Multiome,  
15:34:44 22 immune profiling, five prime gene expression,  
15:34:49 23 targeted gene expression, crisper and cell surface  
15:34:55 24 protein products, you do not offer an opinion that  
15:35:00 25 Bio-Rad has ever lost any money due to 10X selling

15:35:04 1 those particular assays that Bio-Rad doesn't offer?

15:35:14 2 A. Assuming your question is do I agree,  
15:35:18 3 correct. I do not do a lost profits calculation or  
15:35:23 4 specific quantification of lost profits in general  
15:35:25 5 or by product line.

15:35:33 6 Q. Aside from the legal determination of  
15:35:35 7 lost profits, you don't do an even more rudimentary  
15:35:47 8 analysis even attempting to assess any money Bio-Rad  
15:35:57 9 lost due to 10X offering those six product lines  
15:36:03 10 that Bio-Rad does not offer?

15:36:05 11 MS. TU: Objection.

15:36:10 12 A. As far as what I would consider a  
15:36:13 13 rudimentary analysis, that would be a general  
15:36:17 14 competitive assessment, which I think I do offer,  
15:36:21 15 but I do not if you mean by rudimentary analysis  
15:36:23 16 make a back of the envelope calculation of lost  
15:36:26 17 profits or something at such a high level.

15:36:30 18 I have certainly considered that  
15:36:31 19 issue. I recognize that injecting such into a  
15:36:37 20 hypothetical would only increase the result and,  
15:36:39 21 therefore, its conservative not to further that  
15:36:43 22 discussion here and I've chosen not to.

15:36:47 23 Q. You have not opined that any loss of  
15:36:53 24 sales or any revenue on those product lines by those  
15:36:58 25 product lines has happened to Bio-Rad; correct?

15:37:06 1 A. Correct.

15:37:47 2 Q. You have not opined that any of those

15:37:50 3 six Next GEM assays I named competes against Bio-Rad

15:37:56 4 ddSEQ 3 prime RNA-Seq product?

15:38:05 5 (Stenographer clarification.)

15:38:06 6 MS. HADZIMEHMEDOVIC: RNA-Seq, S-e-q.

15:38:16 7 A. Correct, in that I have not done a

15:38:17 8 product line to product line competitive assessment.

15:38:22 9 The purpose of my competitive analysis was more

15:38:24 10 related to the Georgia-Pacific criterion as opposed

15:38:27 11 to a lost profits analysis.

15:38:42 12 Q. You offer no opinion that any of

15:38:43 13 those six Next GEM assays competes against Bio-Rad's

15:38:50 14 attack seek product.

15:38:54 15 A. Same answer.

15:38:59 16 Q. You do not explain anywhere in your

15:39:01 17 report how any of those six product lines either

15:39:08 18 lost sales or lost market share to Bio-Rad; correct?

15:39:15 19 A. The same answer.

15:39:35 20 Q. Is your testimony to the jury going

15:39:38 21 to be that when the parties are sitting at the table

15:39:44 22 with basically perfect knowledge of each other's

15:39:47 23 information, they will think of competition as

15:39:51 24 something different than what they would think of

15:39:55 25 competition in real life?

15:47:49 1 prime gene expression, targeted gene expression,  
15:47:52 2 crisper, or cell surface proteins; correct?

15:47:56 3 MS. TU: Objection.

15:47:57 4 A. I don't know that I can agree with  
15:47:58 5 that because my analysis did not go into that  
15:48:02 6 application level of detail because it was not  
15:48:04 7 necessary. So I couldn't foreclose what Bio-Rad  
15:48:09 8 might say in response to that question.

15:48:13 9 Q. But you're not aware, sitting here  
15:48:15 10 today, of any document that suggests that Bio-Rad  
15:48:18 11 was planning and was capable of delivering these six  
15:48:24 12 product lines in --

15:48:27 13 MS. TU: Same objection.

15:48:28 14 Q. -- Q2 2019?

15:48:31 15 MS. TU: Objection.

15:48:32 16 A. So I was going to say that's the  
15:48:34 17 question you've asked me many times before, but  
15:48:37 18 you've interjected the ability to deliver in  
15:48:39 19 Q2 2019. That I don't know, but again, not relevant  
15:48:44 20 to my analysis for the reasons upon which I rely for  
15:48:48 21 a competitive relationship.

15:48:52 22 Q. You do not identify any evidence in  
15:48:53 23 your expert report that Bio-Rad, as of the date of  
15:48:57 24 the hypothetical negotiation, expected ddSEQ to ever  
15:49:00 25 be able to compete with or without 10X?

15:49:06 1 MS. TU: Objection.

15:49:09 2 A. Well, I would agree with that. I

15:49:10 3 think, for example, the June 2025-year plan that I

15:49:15 4 referenced to you in figure 20 confirms that they

15:49:17 5 did intend to compete with 10X.

15:49:35 6 Q. It says nothing. This document says

15:49:37 7 nothing about their true ability to compete with 10X

15:49:43 8 in the market or without 10X in the market --

15:49:48 9 MS. TU: Objection.

15:49:49 10 Q. -- for ddSEQ?

15:49:50 11 MS. TU: Objection.

15:49:52 12 A. Well, turning to figure 21, there is

15:49:55 13 an assessment of their ability to compete with 10X.

15:50:00 14 It talks about the strengths and weaknesses of 10X,

15:50:03 15 as well as other competitors. I will agree with you

15:50:05 16 I do not have documents where Bio-Rad is

15:50:10 17 contemplating their level of success without 10X in

15:50:15 18 the market, because I don't believe that in normal

15:50:20 19 course they're presupposing that 10X would exit the

15:50:24 20 business.

15:50:39 21 Q. You do not offer any opinion or

15:50:41 22 explanation in your report as to why Bio-Rad would

15:50:44 23 be incentivized to seek a royalty on assays it does

15:50:47 24 not offer, but is just as high as the royalty you

15:50:53 25 say Bio-Rad will seek on assays that it says it

15:50:56 1 offers?

15:50:58 2 MS. TU: Objection.

15:51:00 3 A. I disagree with that. I think that  
15:51:01 4 the Georgia-Pacific analysis is just that Bio-Rad  
15:51:05 5 would seek to have a royalty consistent with the  
15:51:10 6 Georgia-Pacific framework relying because of the  
15:51:12 7 record of this case primarily upon the market  
15:51:15 8 approach as a starting point and the market approach  
15:51:21 9 does not vary the rate based upon a given  
15:51:26 10 competitive dynamic on a product basis. It varies  
15:51:28 11 the rate based generally upon the competitive  
15:51:32 12 relationship between the parties broadly, and I  
15:51:35 13 think my conclusion is consistent with that.

15:51:40 14 Q. Well, the Caliper license contradicts  
15:51:44 15 your statement because it specifically defines  
15:51:47 16 competition as direct and demonstrable impact on the  
15:51:52 17 other side's sales; correct?

15:51:57 18 MS. TU: Objection.

15:51:59 19 A. Perhaps you can point me to the  
15:52:01 20 language that you're referring to.

15:52:28 21 Q. If you'll look on page 30, second  
15:52:37 22 paragraph: Running royalty of 15 percent on  
15:52:47 23 screening applications, and screening applications  
15:52:52 24 were defined in part as those that compete directly  
15:52:55 25 with Caliper LapChip EZ Reader or Profiler Pro

15:53:00 1 products to directly and demonstrably impact sales  
15:53:04 2 of Caliper's LabChip EZ Reader and Profiler Pro  
15:53:08 3 products.

15:53:09 4 Do you see that?

15:53:09 5 A. I do.

15:53:14 6 Q. So there is evidence in the licenses  
15:53:16 7 you relied upon of a specific definition of  
15:53:19 8 competition, which requires direct and demonstrable  
15:53:22 9 impact on the other side's sales, and you use that  
15:53:25 10 license as one of your most comparable licenses;  
15:53:27 11 correct?

15:53:30 12 A. I do use that --

15:53:31 13 MS. TU: Objection.

15:53:31 14 A. I do use that license. I do make the  
15:53:34 15 distinction between competitive and noncompetitive  
15:53:38 16 products. I don't believe that the language of the  
15:53:43 17 license would suggest that somehow the licensor has  
15:53:48 18 to prove on a product-by-product basis that there  
15:53:52 19 was an impact on sales in order to get the higher  
15:53:56 20 rate. I believe what the license shows is two  
15:53:59 21 classifications of products and essentially a  
15:54:01 22 presumption that certain products will have  
15:54:04 23 competitive effect where others won't.

15:54:09 24 Q. Are you reading that particular  
15:54:10 25 language out of the Caliper/RainDance license in

15:54:13 1 considering that license, one of your most  
15:54:16 2 comparable licenses, and reading the 15 percent rate  
15:54:18 3 as the appropriate one?

15:54:24 4 MS. TU: Objection.

15:54:24 5 A. I didn't understand that question.

15:54:39 6 Q. The license says there has to be  
15:54:41 7 direct and demonstrable impact on the sales of the  
15:54:45 8 other side for the 15 percent rate to apply;  
15:54:50 9 correct?

15:54:55 10 A. Well, so let's look at what it says.

15:54:56 11 So it's talking about a situation where the  
15:55:09 12 application is using a RainDance chip reagent for  
15:55:11 13 other noninstrument product that competes with  
15:55:17 14 Caliper's products to directly and demonstrably  
15:55:23 15 impact sales of Caliper's products. I don't read  
15:55:27 16 that to say there is an expectation that RainDance,  
15:55:32 17 when committing its royalty report, can say, Well,  
15:55:35 18 we sold a competitive product, but we don't think  
15:55:37 19 you would have made the sale. Therefore, we don't  
15:55:39 20 have to pay the higher rate. I think what the  
15:55:40 21 agreement is doing is generally defining the  
15:55:44 22 category of competition and presuming that within  
15:55:46 23 that category of competition, there is an impact on  
15:55:49 24 sales.

15:55:58 25 Q. Is it correct that your analysis of

15:56:01 1 competitive rates did not assume the same definition  
15:56:10 2 that the RainDance/Caliper license provides for the  
15:56:14 3 competitive rate?

15:56:17 4 MS. TU: Objection.

15:56:18 5 A. Well, of course, because the  
15:56:22 6 RainDance/Caliper specific terms are specific to,  
15:56:25 7 for example, Caliper products. So as a comparator,  
15:56:31 8 I simply looked to whether or not the parties at the  
15:56:38 9 negotiation would consider themselves competitors,  
15:56:40 10 and I concluded that they do consider themselves  
15:56:45 11 competitors and I find concurrents on that  
15:56:49 12 conclusion from Ms. Davis. So I take comfort in my  
15:56:55 13 work.

15:56:58 14 Q. Your work did not assume or determine  
15:57:03 15 that there was direct and demonstrable impact on the  
15:57:08 16 sales of the licensor by the company you're calling  
15:57:14 17 the competitor and the licensee in the hypothetical  
15:57:19 18 negotiation?

15:57:20 19 MS. TU: Objection.

15:57:21 20 A. I disagree with that. I think the  
15:57:23 21 body of record in this case that I've reviewed  
15:57:26 22 suggests that there is direct excessive impact,  
15:57:28 23 though I have not specifically done a  
15:57:31 24 product-by-product lost sales analysis. I think the  
15:57:35 25 evidence at trial will show direct competition and

16:10:38 1 over a dozen million dollars; is that what you're  
16:10:41 2 referring to?

16:10:44 3 MS. TU: Objection.

16:10:45 4 A. I don't know what the cost was, but  
16:10:47 5 it's my understanding that it was 10X's position  
16:10:50 6 that they had alternatives to the patents at issue  
16:10:53 7 in the prior case.

16:10:56 8 Q. And Bio-Rad obtained the injunction  
16:10:57 9 by representing to the Federal Circuit that 10X was  
16:11:02 10 free to sell Next GEM; correct?

16:11:06 11 MS. TU: Objection.

16:11:09 12 A. That I don't know. I've not reviewed  
16:11:11 13 the arguments in front of the Federal Circuit.

16:11:17 14 Q. You did not rely upon or consider  
16:11:19 15 that in forming your opinions in this case; correct?

16:11:22 16 MS. TU: Objection.

16:11:24 17 A. Correct, to the extent I haven't  
16:11:25 18 reviewed it, I could not have relied upon it or  
16:11:28 19 considered it.

16:11:30 20 MS. HADZIMEHMEDOVIC: Could we please  
16:11:31 21 take a short break?

16:11:34 22 THE VIDEOGRAPHER: Five minutes.

16:11:39 23 MS. HADZIMEHMEDOVIC: Let's maybe do  
16:11:40 24 10 minutes, if that's okay.

16:11:42 25 THE VIDEOGRAPHER: Okay. We're going

16:32:33 1 the United States the infringing articles?

16:32:39 2 A. I don't disagree with that.

16:32:47 3 Q. And your opinion is that the ITC's

16:32:53 4 injunction against Bio-Rad on the ddSEQ product has

16:32:58 5 no impact on the hypothetical negotiation in this

16:33:01 6 case?

16:33:03 7 MS. TU: Objection.

16:33:04 8 A. More specifically I have not

16:33:06 9 considered the injunction as part of my work. So I

16:33:11 10 can't give an opinion either way. I don't have

16:33:14 11 enough facts to assess.

16:33:17 12 Q. Were you instructed by Bio-Rad's

16:33:18 13 counsel not to consider it?

16:33:21 14 MS. TU: Objection.

16:33:23 15 A. No, but typically other litigation

16:33:27 16 proceedings are not addressed within the

16:33:33 17 hypothetical. For example, I do not specifically

16:33:36 18 account for the prior Delaware case in the

16:33:41 19 hypothetical in this case. I've dealt with this

16:33:44 20 case uniquely and separately.

16:33:53 21 Q. You did not offer any opinion in your

16:33:57 22 report regarding whether Becton Dickinson and

16:34:00 23 Bio-Rad -- strike that.

16:34:06 24 You did not offer any opinion in your

16:34:08 25 report regarding whether Becton Dickinson or Bio-Rad

1                   C E R T I F I C A T E  
2                   I, RICHARD GERMOSEN, CCR No.

3                   30XI00184700, a New Jersey Certified Court Reporter,  
4                   New Jersey Certified Realtime Court Reporter,  
5                   California Certified Shorthand Reporter License No.  
6                   14391, California Certified Realtime Reporter, NCRA  
7                   Certified Realtime Reporter and NCRA Registered  
8                   Diplomate Reporter, do hereby certify:

9                   That the foregoing proceedings were  
10                  taken before me at the time and place therein set  
11                  forth; at which time the witness declared under  
12                  penalty of perjury; that the testimony of the witness  
13                  and all objections made at the time of examination  
14                  were recorded stenographically by me and were  
15                  thereafter transcribed under my direction,  
16                  supervision; that the foregoing is a full, true and  
17                  complete transcript of my shorthand notes so taken  
18                  and of the testimony so given;

19                  That before completion of the  
20                  deposition, review of the transcript was not  
21                  requested; ( ) that the witness has failed or refused  
22                  to approve the transcript. I further certify that I  
23                  am not financially interested in the action, and I am  
24                  not a relative or employee of any attorney of the  
25                  parties, nor of any of the parties. I  
                       declare under penalty of perjury under the laws of  
                       California that the foregoing is true and correct.  
Dated this 7th day of April, 2021.

16                    
17

18                  RICHARD GERMOSEN,  
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